TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 763.

MAX HART, APPELLANT,

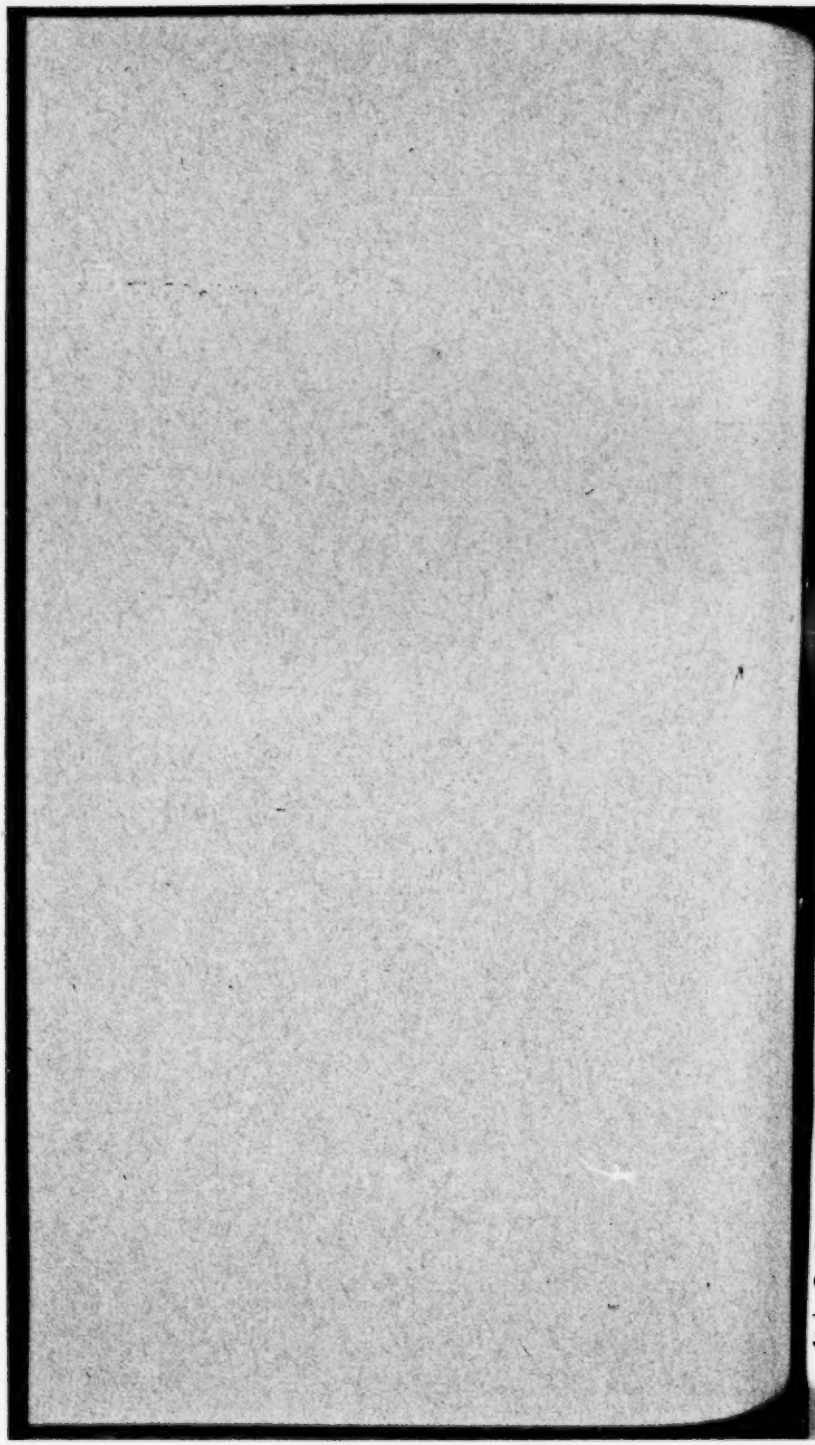
vs.

B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC.; EXCELSIOR COLLECTION AGENCY, INC., *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 27, 1922.

(29,313)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 8, 1923.

1 United States District Court for the Southern District of New York.

In Equity. No. E.

MAX HART, Plaintiff,
against
B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., Excelsior Collection Agency, Inc., Edward F. Albee, John J. Murdock, Frederick F. Proctor, Morris Meyerfeld, Jr., Martin Beck, Frank Vincent, Reid Albee, Harry Jordan, Maurice Goodman, and Harry W. Gugler, Doing Business under the Trade Name and Style of Vaudeville Collection Agency, Defendants.

BILL OF COMPLAINT.

[Filed May 27, 1921.]

Plaintiff, by Eppstein & Axman, his attorneys, for his complaint, alleges:

I. Plaintiff is, and at all times herein mentioned was, a citizen and resident of the Southern District of New York.

II. The defendant B. F. Keith Vaudeville Exchange is, and at all times hereinafter mentioned was, a corporation duly or-
2 ganized and existing under and by virtue of the laws of the State of Maine, with an office and place of business in the City, State and Southern District of New York. It was formerly known under the name of United Booking Office of America, and at all times herein mentioned has been, and now is engaged in business in, and now may be found within the Southern District of New York; it is organized as a business corporation; has an authorized capital stock issued and outstanding; the purposes for which it is organized, according to its certificate of incorporation, are to contract with and engage acts, attractions, specialties, amusements, actors, musicians, singers, entertainers and performers for theatres, vaudeville entertainments and the like; to contract with theatres, vaudeville entertainments and the proprietors thereof for the appearance of acts, attractions, specialties, amusements and for the services of actors, musicians, singers, entertainers and performers at and for stated periods or otherwise; to act as the agent of theatres, theatrical and vaudeville proprietors and amusement enterprises; to do a "booking" business as said term "booking" is understood by theatres, theatrical and vaudeville proprietors and amusement enterprises; to manufacture theatrical scenery and properties; to lease, build, operate, manage, control, buy, sell, own, deal in theatres and other places of amusement and entertainment; to make any contracts necessary or convenient for the purposes of said business; to buy, own, hold, lease, sell and deal in any real estate and

such personal property as is necessary or incidental to the purposes set out; and to do any and all things necessary or incidental in connection with said business to enhance the value of the company's property or rights; it has an executive management consisting of a President, Vice-President, Secretary, Treasurer and other lesser officers, some of whom reside in the City of New York and
3 are employed by it, and among other places, exercise their respective functions at said City of New York.

III. The defendant Orpheum Circuit, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business in the City, State and Southern District of New York. It is the successor to Central Vaudeville Promotion Company, and at all times herein mentioned it and its predecessor has been and now is engaged in business, and now may be found within the Southern District of New York; it is organized as a business corporation, has an authorized capital stock issued and outstanding; the purposes for which it is organized, according to its certificate of incorporation, are to purchase, lease, own or otherwise acquire and to manage theatres, music halls, opera houses and places of amusement and entertainment; to sell, mortgage, let or otherwise dispose of such theatres and other places of amusement; to provide for the production, representation and performance of operas, stage plays, dramas, comedies, burlesque performances, vaudeville performances, ballets, pantomimes, moving pictures and other musical and dramatic performances and entertainments and to carry on a general theatrical business; to act as agent for theatres and other places of amusement and entertainment and the owners and persons conducting the same and to act as agent for actors, singers, musicians, performers and entertainers of every kind; to do a booking business as the term "booking" is understood by the proprietors of theatres and the theatrical profession generally; and to maintain and conduct a theatrical employment agency; to purchase and otherwise acquire and to sell or otherwise dispose of and deal in plays, sketches, copyrights, dramatic
4 and musical productions and rights of every kind therein, and licenses and privileges of every sort for the purposes of said business; to purchase, manufacture or otherwise dispose of and deal in theatrical properties and scenery, and to maintain and operate theatrical information, press and art bureaus and to conduct a photograph business; to apply for, register, obtain, purchase, lease or otherwise acquire and hold, own, use and operate or introduce and sell, assign or otherwise dispose of or grant license in respect of or otherwise turn to account any and all trade marks, trade names, patents, inventions, improvements and processes used in connection with or secured under letters patent of the United States or elsewhere or otherwise; and with a view to working and development of the same, to carry on any business, whether manufacturing or otherwise, which this corporation may deem calculated, directly or indirectly, to effectuate these objects; to acquire by purchase or otherwise, and to own, hold, sell, lease, mortgage or otherwise dispose of all such property as the purposes of this corporation shall require, or which

may be necessary and proper to be used in connection with the business of the corporation, and to do and perform any and all acts and things not herein specifically enumerated, which may be necessary to be done or performed in order to properly carry on or conduct the business of the corporation, and to advance the interests thereof; the corporation shall have power to acquire by purchase or otherwise the whole or any part of the business, good will, property, assets and contracts of any person, firm or corporation engaged in a business of the same general character as that for which this corporation is organized, if the same are, in the judgment of the Board of Directors, useful to the business of the corporation, and may pay therefore in stocks, bonds, notes, debentures or other obligations of the corporation; the corporation may purchase, acquire, hold, sell, assign, transfer, pledge or otherwise dispose of the shares of the capital stock, bonds or other evidences of indebtedness of any corporation of the State of New York or of any other State or elsewhere, and in so purchasing, holding or otherwise acquiring such stock, bonds or other evidences of indebtedness to issue in exchange, its stock, bonds, debentures or other obligations; and the corporation may guarantee the bonds of any domestic corporation engaged in the same general line of business.

IV. On information and belief, that the defendants Murdock, E. F. Albee and Proctor are directors of the defendant B. F. Keith Vaudeville Exchange; Edward F. Albee is its President; Frederick F. Proctor is its Vice-President, and John J. Murdock is its General Manager. E. F. Albee is the person duly designated by said company upon whom process may be served within the State of New York, and said E. F. Albee has an office and place of business in the Borough of Manhattan, City and State of New York, which is the place where said corporation has its principal place of business within this State.

V. On information and belief, that said defendants E. F. Albee, Proctor, Murdock, Maurice Goodman, Harry W. Gugler and Frank Vincent are citizens and residents of the Southern District of New York, and each and all of them may now be found in said district.

VI. On information and belief, defendants Meyerfeld, Jr., and Beck are engaged in business, have an office and place of business and may now be found in the City, State and Southern District of New York, and the said Beck has his place of residence in the aforesaid City, State and Southern District of New York.

VII. On information and belief, that the defendants Meyerfeld, Jr., and Beck are stockholders of the defendant Orpheum Circuit, Inc., and control its affairs, and they controlled the affairs of its predecessor, Central Vaudeville Promotion Company. Meyerfeld, Jr., is President and Beck is the General Manager of Orpheum Circuit, Inc., and as such General Manager Beck has an office and place of business in the City and Southern District of New York, which is the place where said Orpheum Circuit, Inc., has its principal place of business.

VIII. Upon information and belief, the defendant Excelsior Col-

lection Agency, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business in the City, State and Southern District of New York, and at all times hereinafter mentioned has been and is engaged in business and may be found within the Southern District of New York, and is organized as a business corporation and has authorized capital stock issued and outstanding. The purposes for which it is organized, among others, is to act as a collection agent for money from the salaries of the various acts, troupes and performers appearing on what is known as the Orpheum Circuit, the said corporation is dominated and controlled by the defendants Meyerfeld, Jr., Martin Beck and Frank Vincent and Orpheum Circuit, Inc., and upon information and belief its capital stock is owned and controlled by some of the said individual defendants.

IX. On information and belief, that the defendant Harry
7 W. Gugler does business under the firm name and style of Vaudeville Collection Agency, a registered trade name, and conducts an office and place of business in the City, State and Southern District of New York, and at all times hereinafter mentioned has been, and now is, engaged in business and may be found within the Southern District of New York. The business transacted by the said defendant Gugler was at all times herein mentioned, and now is, to act as a collection agent for money from the salaries of various acts, troupes and performers appearing on what is known as the Keith Circuit and the said Harry W. Gugler and his said business is dominated and controlled by the defendants Edward F. Albee, Frederick F. Proctor, John J. Murdock, Reid Albee, Harry Jordan, Maurice Goodman and B. F. Keith Exchange.

X. On information and belief, that the defendants herein, either separately or jointly, by themselves or with other persons, own or control and operate, and at all times herein mentioned have owned or controlled and operated theatres in divers cities throughout the United States, and among such theatres are the following: The Fordham, Palace, 81st Street, Coliseum, Hamilton, Riverside, Harlem Opera House, Regent, The Colonial, Alhambra and Bronx Theatres, East 125th Street, 58th Street and Third Avenue, Fifth Avenue, 23rd Street, in the city and State of New York; the Prospect in Brooklyn; Proctor's Troy, Albany, Schnectady, and Proctor's Theatre, Newark, N. J.; B. F. Keith's Theatre, in the City of Boston in the State of Massachusetts; The Orpheum, Bushwick and Greenpoint Theatres, in the Borough of Brooklyn, City and State of New York; Mt. Vernon Theatre, at Mt. Vernon, N. Y.; B. F. Keith's New Theatre, in the City of Philadelphia, in the State of Pennsylvania;
the Hippodrome Theatre, in the City of Cleveland, in the
8 State of Ohio; B. F. Keith's Theatre, in the City of Columbus in the State of Ohio; B. F. Keith's Theatre, in the City of Toledo, in the State of Ohio; the Columbia Theatre, in the City of Cincinnati, in the State of Ohio; B. F. Keith's Theatre, in the City of Louisville, in the State of Kentucky; the Grand Opera House, in the City of Indianapolis, in the State of Indiana; the Bijou Theatre in the City of Boston, in the State of Massachusetts; the New Theatre

in the City of Portland, in the State of Maine; Chase's Theatre, in the City of Washington, in the District of Columbia; the Temple Theatre, in the City of Syracuse, in the State of New York; and at all such times were and now are engaged in the business, as hereinafter more particularly described, of producing and presenting what is known as big-class vaudeville theatrical performances at said theatres.

XI. On information and belief, that defendant Albee also owns or controls and operates, and at all times herein mentioned has owned or controlled and operated, theatres in divers cities throughout the United States, and among such theatres are the following: B. F. Keith's Theatre, in the City of Lowell, in the State of Massachusetts; B. F. Keith's Theatre, in the City of Province, in the State of Rhode Island; and at all such times he was and now is engaged in the business, as hereinafter more particularly described, of producing and presenting what is known as high-class vaudeville theatrical performances at such theatres; Harry Davis' Grand Opera House, in the City of Pittsburgh, in the State of Pennsylvania; Kernan's Maryland Theatre, in the City of Baltimore, in the State of Maryland; Shea's Theatres, respectively, in the City of Buffalo, in the State of New York; and Toronto, in the Dominion of Canada; The Temple Theatres, respectively, in the Cities of Detroit, in
9 the State of Michigan, and Rochester, in the State of New York; S. Z. Poli's Theatres, respectively, in the Cities of Worcester and Springfield, in the State of Massachusetts; Hartford, New Haven, Bridgeport and Waterbury, in the State of Connecticut; and Wilkes-Barre and Scranton, in the State of Pennsylvania; the Temple Theatre, in the City of Hamilton, in the Dominion of Canada; the Orpheum Theatre, in the City of Montreal, in the Dominion of Canada; the Dominion Theatre, in the City of Ottawa, in the Dominion of Canada; the Auditorium Theatre, in the City of Quebec, in the Dominion of Canada; Henderson's Music Hall, at Coney Island, in the State of New York; Brighton Beach Music Hall, in the City and State of New York; Morrison's Music Hall, in the City of Rockaway, in the State of New York; the Lynn Theatre, at the City of Lynn, in the State of Massachusetts; the Colonial Theatre, in the City of Dayton, in the State of Ohio; the Shubert Theatre, in the City of Utica, in the State of New York, and the Orpheum Theatres in the Cities of Reading, Allentown, Harrisburg and Altoona, in the State of Pennsylvania; the Colonial and Lyric Theatres, in the City of Richmond, in the State of Virginia; the Colonial Theatre, in the City of Norfolk, in the State of Virginia; Dockstader's Garrick Theatre, in the City of Wilmington, in the State of Delaware; the Hudson Theatre, in the City of Union Hill, in the State of New Jersey; the Forsythe Theatre, in the City of Atlanta, in the State of Georgia; the Colonial Theatre, in the City of Erie, in the State of Pennsylvania, and B. F. Keith's Theatre, in the City of Atlantic City, in the State of New Jersey.

XII. On information and belief, defendants Meyerfeld, Jr., and Beck own or control and operate, and at all times herein mentioned have owned or controlled and operated, theatres in divers

10 cities of the United States, and among such theatres are the following: The Orpheum Theatre, in the City of San Francisco, in the State of California; the Orpheum Theatre, in the City of Los Angeles, in the State of California; the Orpheum Theatre, in the City of Oakland, in the State of California; the Orpheum Theatre, in the City of New Orleans, in the State of Louisiana; the Orpheum Theatre, in the City of Kansas City, in the State of Missouri; the Orpheum Theatre, in the City of Omaha, in the State of Nebraska; the Orpheum Theatre, in the City of Denver, in the State of Colorado; the Orpheum Theatre, in the City of St. Paul, in the State of Minnesota; the Orpheum Theatre, in the City of Minneapolis, in the State of Minnesota; the Orpheum Theatre, in the City of Salt Lake City, in the State of Utah; the Orpheum Theatre, in the City of Memphis, in the State of Tennessee; the Orpheum Theatre, in the City of Sioux City, in the State of Iowa; The State Lake, in the City of Chicago, State of Illinois; The Majestic Theatre, the Chicago Grand Opera House, the Olympic Theatre, in the City of Chicago, in the State of Illinois; the Columbia Theatre and Palace Theatre, in the City of St. Louis, in the State of Missouri; the Majestic Theatre, in the City of Des Moines, in the State of Iowa; the Majestic Theatre and the Palace Theatre, in the City of Milwaukee, in the State of Wisconsin; the Orpheum Theatre, in the City of Evansville, in the State of Indiana; the Orpheum Theatre, in the City of Duluth, in the State of Minnesota; the Orpheum Theatre, in the City of Winnipeg, in the Dominion of Canada; the Orpheum Theatre, in the City of Lincoln, in the State of Nebraska; the Orpheum Theatres, in the Cities of Spokane and Seattle, in the State of Washington; the Orpheum Theatre, in the City of Portland, in the State of Oregon; and now are, and at all times herein mentioned have been, engaged

11 in the business, as hereinafter more particularly described, of producing and presenting what is known as high-class vaudeville theatrical performances at such theatres. All of the said theatres are known as and comprise the Orpheum Circuit.

XIII. The theatres enumerated in paragraph "XII" hereof constitute a group or circuit of theatres which are, and at all times herein mentioned were, known in the theatrical and vaudeville business and to the theatrical and vaudeville trade and to those engaged therein as the Orpheum Circuit of theatres and will be hereinafter referred to as the "Orpheum Circuit."

XIV. The theatres enumerated in paragraphs "X" and "XI" hereof constitute a group or circuit of theatres which are, and at all times herein mentioned were, known in the theatrical and vaudeville business and to the theatrical and vaudeville trade and to those engaged therein as the Keith Circuit of vaudeville theatres, and will hereinafter be referred to as the "Keith Circuit."

XV. Vaudeville, as the term is used and understood throughout the United States and in the Dominion of Canada, consists of an entertainment for hire, extending over a period of time of from two or three hours, during the day or night, upon the stage of a regularly licensed theatre or playhouse, where in return for one

admission fee the spectators are afforded the opportunity of witnessing a number of disassociated, short performances by actors, acrobats, musicians, singers, dancers, exhibitors, conjurers, athletes and other entertainers, and high-class vaudeville is vaudeville as above defined performed by high-class artists and acts at theatres having but two performances a day.

12 XVI. The business, trade and commerce of producing vaudeville, as hereinbefore defined, is conducted by six classes of persons, to wit:

(*a*) Authors of vaudeville acts or productions.
(*b*) The producers of vaudeville acts and productions.
(*c*) Performers.
(*d*) Managers or personal representatives.
(*e*) Booking agents or agencies.
(*f*) Theatre proprietors.

(A) The authors of vaudeville acts or productions are persons who conceive and create the script and/or action and/or arrangement of the acts.

The acts when so created are usually copyrighted, and the authors are the owners of the property rights in the property so created by them, and when copyrighted, have the exclusive right to print, re-print, publish, copy and vend the copyrighted work; to perform or represent the copyrighted work published; to vend any manuscript or any record whatsoever, thereof; to make or to procure the making of any transcript or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever.

The authors of the acts next attempt either to produce the act themselves, or to contract for its production.

(B) The producers of vaudeville acts or productions consist of individuals, copartners or corporations engaged in the business of organizing and building vaudeville acts, and the production 13 involves the acquisition from the author of the rights to produce; the purchase of such costumes, scenery, mechanical and electric effects or whatever may be necessary to produce the acts, and generally the employment of performers, and finally, the direction and rehearsal of the act, until it becomes the production conceived by the author, and is ready for booking.

When the production is ready for booking, the producer's next step is to secure contracts for such acts, and practically all negotiations for such contracts not only contemplate, but if successful, result in the transportation of such acts from State to State, throughout a part, if not all of the States and Territories of the United States of America and Canada.

(C) The class of performers embraces actors, acrobats, athletes, musicians, singers, jugglers, conjurers and a great many other entertainers.

(D) The class of managers or personal representatives embrace those who are regularly engaged as the personal representatives and business managers of those embraced in the foregoing two classes.

(E) The class of booking agents or booking agencies, embrace those agencies which arrange for contracts between the proprietors of theatres and the owners of acts and/or performers.

(F) The class of proprietors embrace the owners, lessees and proprietors of theatres and playhouses who are engaged in presenting vaudeville entertainment for hire; this latter class contracts with those embraced in the first, second and third classes for completed production, usually through the agencies of those embraced in the fourth and fifth classes.

14 The proprietors own, lease or control theatres and playhouses, at which and in connection with which they employ numerous persons, such as stage hands, property men, carpenters, electricians, ushers, ticket sellers, stage managers, conductors and musicians; they purchase and cause to be manufactured and shipped to them at such theatres and playhouses large quantities of valuable scenery, furniture, fixtures and costumes, some of which is purchased in a State other than that in which such theatre or playhouse is located, and shipped from such State to the State where such theatre or playhouse is located; these proprietors also purchase and cause to be manufactured for and shipped to them great quantities of advertising matters, such as bill posters and hand bills, much of which they cause and procure to be transported in interstate and foreign commerce; they also cause and procure to be printed, and thereafter offer the same for sale, and do sell, tickets of admission to the entertainments which they are engaged in producing, and for which tickets they receive large sums of money.

As a further part of the aforesaid business, trade and commerce, said theatre proprietors enter into contracts with the producers and owners of vaudeville acts wherein and whereby such acts are contracted for to appear at said proprietor's theatres. Said contracts are known as and referred to as "booking contracts."

Such acts are generally booked in New York, and the contracts contemplate and result in the transportation of the acts, which, of course, include the performers, scenery, music, costumes, and whatever constitutes the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said

14½ business has grown to such proportions, that there is a constant stream of commerce in and among the States and from State to State, and through the various Territories of the United States, in said business.

The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases, the use of large quantities of accessories, and special transportation equipment and facilities.

15 XVII. The aforesaid theatres in the aforesaid Keith Circuit and Orpheum Circuit constitute and are practically all of the theatres in the United States and the Dominion of Canada at which high-class vaudeville entertainments are produced.

XVIII. All persons who perform in vaudeville in the United

States and Canada aspire to obtain employment by the owners and operators of said theatres in said Keith Circuit and Orpheum Circuit, and no high class performer who is debarred therefrom can obtain sufficient employment in vaudeville at any other theatres in the United States and the Dominion of Canada, at which high class vaudeville entertainments are produced, from which he or she can earn a living.

XIX. Plaintiff at all times hereinafter mentioned has maintained, and but for the acts hereinafter complained of would have
16 maintained, an office and place of business in the City of New York and State of New York, and has laid out and expended large sums of money in building his organization and now has large sums of money invested in his aforesaid business; by the expenditure of large sums of money, and through the medium of extensive advertising throughout the United States, plaintiff's business has become widely known through the whole of the United States of America. Plaintiff keeps the owners and proprietors of theatres and playhouses advised of the latest attractions and successes in vaudeville, and also keeps the performers advised of the most desirable places at which they may present their performances; through this comprehensive acquaintance with the vaudeville situation, plaintiff has been enabled to and does conduct a large business as manager and personal representative of vaudeville performers and acts, and has organized a large substantial interest in many acts which he has always represented; for many years he has been employed by many of the most successful and best known vaudeville performers to act as their manager and personal representative; many such performers have, from time to time, employed plaintiff and paid him large sums of money for acting as their manager and personal representative. Plaintiff's business as such manager and personal representative, among other things, has consisted and does consist in contracting with such performers to negotiate for them with the proprietors of theatres and playhouses for the employment of such performers by said proprietors; to arrange a series of employments in various countries and cities; to arrange an itinerary of performances for such performers so as to keep them continuously employed, and to reduce the amount and expense of their traveling to a minimum; to furnish such performers with information as to the most available and satisfactory routes of travel,
17 the most satisfactory hotels at which to stop, the customs and manners of the various countries which they are to visit, and where they are to travel from one country to another; to arrange for such performers the necessary papers to be used in their dealings with the customs, immigration and other Government officials. Many of the performers who have employed plaintiff's services are actors, performers, jugglers, conjurers, acrobats and various other kinds of entertainers, operating either alone or what is known as acts or troupes acting together, who as a part of their performances have to and do avail themselves of the use of large quantities of scenery, costumes, fixtures and apparatus, animals, birds and rep-

tiles, which belong to them and which they carry with them from place to place and from state to state in the United States of America; in such cases where plaintiff has been employed as manager or personal representative, he in many instances as a part of his employment has attended to the transportation and shipment of such scenery, costumes, fixtures, apparatus, animals, birds and reptiles, and in many cases this is and has been a very large part of plaintiff's business aforesaid. Most, if not all, of the performers engaged in vaudeville have advertising matter, consisting of bill posters and photographs, which are distributed, posted and circulated in the cities where such performers are to appear, and as a part of plaintiff's business as manager and personal representative for such performers he has attended and does attend to the procuring of such advertising matter and to the preparation of the same and to its shipment from one country to another and from one state to another state in the United States, and to its publication and distribution in advance of the appearance of such performers, and produces and assists in the production and staging of acts; as-
18 sists in financing acts and/or teams; supplies and assists the said acts and performers in securing scenery, props, costumes and other supplies; assists, arranges and provides booking for said acts and performers; and for the aforesaid services plaintiff has been and is paid by such performers. By reason of the excellence of the service which plaintiff has rendered and does render to his aforesaid patrons, and by reason of his world-wide acquaintance and familiarity with the conditions of the vaudeville business, and by reason of his courteous and efficient treatment of his patrons and the success attained by such patrons through plaintiff's services as aforesaid, plaintiff has built up and attained a very remunerative business and a good will of great value and has earned, and until the wrongful misconduct of these defendants, as hereinafter more particularly described, was earning, large sums of money from his aforesaid business, to wit, about the sum of $50,000 annually, and said business was constantly growing in value until the acts herein complained of occurred, and but for such unlawful acts would have continued to grow.

XX. For many years plaintiff, as manager and personal representative of many of the leading vaudeville performers, negotiated for them contracts of employment to perform at all or nearly all of the aforesaid theatres in the aforesaid Keith and Orpheum Circuits, and for such services has received large sums of money from such performers; and at all times since the establishment of defendant B. F. Keith Vaudeville Exchange, plaintiff as manager and personal representative of many of the most prominent vaudeville performers negotiated for them contracts of employment to perform in vaudeville at all or nearly all of the aforesaid theatres in the aforesaid Keith's Circuit, and such contracts of employment were so negotiated through said defendant B. F. Keith Vaudeville Exchange.

19 XXI. At all times since the establishment of defendant Orpheum Circuit, Inc., and its predecessor, Central Vaude-

ville Promotion Company, plaintiff as manager and personal representative of many of the most prominent vaudeville performers negotiated for them contracts of employment to perform in vaudeville at all or nearly all of the aforesaid theatres in the aforesaid Orpheum Circuit, and such contracts of employment were so negotiated through said Orpheum Circuit, Inc., and/or its predecessor, Central Vaudeville Promotion Company.

XXII. Through plaintiff's oragnization, and because of his efficient services as aforesaid, he has succeeded in bringing and causing and procuring to come to the United States of America, and in obtaining employ*ing* for them to perform in vaudeville at the aforesaid theatres in the aforesaid Keith Circuit and Orpheum Circuit, a great number of first class and recognized vaudeville stars.

XXIII. That as a result of plaintiff's knowledge of the vaudeville business, his ability in assisting performers in properly presenting their talent to the best advantage to the public; of procuring for them the proper vehicles for presentation of their skill; of revising their acts, and of the other services hereinbefore set forth, plaintiff has secured for the performers he has represented the most advantageous terms possible, and has come to be recognized as one of the ablest and most successful personal representative and manager of vaudeville performers and acts in the United States of America, and has constantly increased the earning capacity and professional standing of the artists and performers he has represented. Plaintiff has devoted the past fifteen years of his life to developing his knowledge of the aforesaid business, and has acquired special proficiency in the line of his business and profession, and as a result of his services aforesaid, and of his recognized fidelity to the interests of his clients, his business and his reputation and earnings were constantly increased, and but for the unlawful acts of the defendants hereinafter complained of would have continued so to increase.

XXIV. Defendants E. F. Albee, Proctor, Meyerfeld, Jr., Beck and J. J. Murdock, and other of the defendants herein, either together and/or alone, as hereinbefore stated, own or control and operate a large number of theatres throughout the United States; at all of these theatres they are, and at all times herein mentioned have been, engaged in the business of producing vaudeville entertainments for hire; and in connection with and as a part of such business they are, and at all times herein mentioned have been, engaged in employing a large number of persons, to wit, stage managers, laborers, carpenters, electricians, conductors, musicians, ushers, doorkeepers and ticket sellers, such persons render services in connection with the performances of vaudeville at such theatres and are paid by said defendants for such services; said defendants also, in connection with and as a part of the said business, employ agents, who are located in the City of New York, who act for them in employing persons to perform in vaudeville for them in their aforesaid theatres, and through such agents said defendants from time to time enter into contracts with performers such as actors, acrobats, athletes, conjurers, jugglers, singers, musicians and various

other entertainers, wherein and whereby said performers agree to travel from one city in one state to another city in another state of the United States and to perform in vaudeville for said defendants at their theatre in the latter place, and as a result of

21 such contracts performers do travel and have traveled from one state to another state of the United States and have performed and do perform in vaudeville for said defendants at their aforesaid theatres, and such performers have been and are paid for such services by said defendants, and as a part of their aforesaid business said defendants have entered into and do enter into contracts with performers wherein and whereby such performers have agreed and do agree to come to the United States from a foreign country, and upon arriving in the United States to perform in vaudeville for said defendants at their aforesaid theatres, and wherein and whereby said defendants have agreed and do agree to pay said performers for such services, and as a result of such contracts said performers have and do come to the United States from foreign countries, to wit, Europe, Asia and other countries, and have performed and do perform in vaudeville for said defendants at their aforesaid theatres, and have been and are paid therefor by said defendants. And, in many instances, said performers have brought and do bring with them, from such foreign countries to the United States, large quantities of paraphernalia such as scenery, costumes and fixtures, animals, birds and reptiles, which they have transported and caused to be transported to the United States, and from one city in one state to another city in another state of the United States in connection with and as a part of their work in performing for said defendants in vaudeville at their aforesaid theatres as aforesaid wherefore plaintiff claims defendants to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the Act of Congress approved July 2, 1890, and entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

22 XXV. On information and belief, that in the case of many of the theatres hereinbefore stated to be owned or controlled and operated by the defendants E. F. Albee, Proctor, J. J. Murdock, Meyerfeld, Jr., and Beck, they do not actually own the theatre building, but the same is owned or leased by a corporation or corporations organized, dominated and/or controlled by said defendants, and said corporation or corporations owns or own, leases or lease, and at all times herein mentioned has or have owned or leased the teatre building; but in all such cases said defendants own, and at all times herein mentioned have owned, a large majority if not all, of the capital stock of such corporation or corporations and at all times herein mentioned they have absolutely dominated said corporation or corporations and managed and controlled its theatre building to all intents and purposes as if the same were actually owned by them; and in all such cases said defendants have regulated and controlled every detail of the business of producing vaudeville at such theatres and have caused and procured the employment and discharge of all persons connected therewith, and

dictated and controlled the character of performances produced at such theatres and caused and procured the employment of performers to perform in vaudeville at such theatres; many such theatres so dominated, controlled and managed by them are located in states other than the State of New York; and in connection with and as a part of their aforesaid domination, management and control of said theatres they have caused and procured, at all times herein mentioned, their agents, servants and employees in the City and State of New York to enter into and conduct negotiations with performers looking to the employment of such performers to appear and perform for them in vaudeville at such theatres; and as a result
23 of such negotiations, said agents, servants and employees have caused and procured contracts to be entered into and do cause and procure such performers to travel from said City of New York to said theatres in states other than the State of New York, and to perform in vaudeville for said defendants and their aforesaid corporations, and said defendants have caused and procured and do cause and procure said performers to be paid therefor; and so plaintiff claims defendants to have been and to be engaged in business, trade and commerce, among the several states of the United States, within the meaning of the aforesaid Act of Congress.

XXVI. On information and belief, that the defendants E. F. Albee, Proctor, Meyerfeld, Jr., and Beck, in connection with and as a part of the business of producing vaudeville at the theatres dominated, managed and controlled by them, as stated in the last preceding paragraph, have at all times herein mentioned caused and procured their agents, servants and employees located in the City and Southern District of New York to enter into and conduct negotiations with vaudeville performers located in Europe, looking to and resulting in said vaudeville performers coming to the United States of America to perform for hire in vaudeville performances at said theatres; and in such instances, and there have been many such, that being a regular part of said defendants' business, said performers have so come to the United States as a result and because of written agreements between them and said defendants' agents, servants and employees aforesaid; and in many such cases said performers, in compliance with and as a part of their aforesaid agreements, have brought with them and caused and procured to be transported from Europe to the United States, large quantities of scenery, fixtures, costumes, animals, birds and reptiles and other paraphernalia; and for their coming to the United States, and bringing and causing to be brought such paraphernalia as aforesaid, and for performing in vaudeville at such theatres, said defendants have at all times herein mentioned caused and procured said vaudeville performers to be paid; and so plaintiff claims defendants to be, and at all times herein mentioned to have been, engaged in business, trade and commerce with foreign nations within the meaning of the aforesaid Act of Congress.
24

XXVII. On information and belief, that the entire capital stock of the defendant B. F. Keith Vaudeville Exchange, at all times hereinafter mentioned, has been owned by A. Paul Keith and the

defendants Edward F. Albee, Frederick F. Proctor and John J Murdock, and at all times herein mentioned, prior to the death of the said A. Paul Keith, they have dominated and controlled the management of the entire business of said corporation defendant, and since the death of the said A. Paul Keith the defendants Edward F. Albee, Frederick F. Proctor and John J. Murdock have dominated and controlled the management of the said entire business.

XXVIII. On information and belief, that the majority of the capital stock of the defendant Orpheum Circuit, Inc., and its predecessor, Central Vaudeville Promotion Company, is, and at all times herein mentioned has been, owned by the defendants Morris Meyerfeld, Jr., and Martin Beck; that said defendants caused and procured said company to be incorporated and at all times since its incorporation have dominated and controlled and now dominate and control its entire business.

XXIX. The business in which the defendant B. F. Keith Vaudeville Exchange is, and at all times since its incorporation has
25 been, engaged consists in employing vaudeville performers to perform in vaudeville for the defendants E. F. Albee, Proctor and Murdock at the theatres owned or controlled and operated by them respectively, as hereinbefore stated; it is the agent for said defendants in the City and Southern District of New York, and at all times herein mentioned, as such agent, it has been engaged in entering into and conducting negotiations with vaudeville performers looking to and resulting in the employment of such performers to perform in vaudeville for said defendants at their respective theatres aforesaid; and as such agent for said defendants, from time to time, and as a regular part of its business, it has entered into and conducted negotiations with various and sundry persons who have been and are acting as managers and personal representatives of vaudeville performers; and among such managers and personal representatives of such vaudeville performers with whom said defendant has heretofore entered into and conducted such negotiations has been this plaintiff; that as a regular part of its business said defendant dealt with this plaintiff and through this plaintiff arranged for and procured contracts for the employment of various and sundry vaudeville performers for whom plaintiff was acting in the capacity of manager and personal representative as aforesaid, and in and by such contracts so procured said defendant as agent, as aforesaid, employed and agreed to employ said vaudeville performers to perform in vaudeville for said defendants E. F. Albee and Proctor, respectively, at their aforesaid theatres throughout the United States. And in conducting the aforesaid negotiations looking to and resulting in the employment of said performers as aforesaid, and as a part of its business, said defendant has caused and procured said performers to agree to travel from one state to another state in the United States and to perform in vaudeville in such latter state; and as a
26 result of such agreements said performers have traveled and do travel from one state to another state in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from a

foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit, Germany, France, England, Australia and other countries to the United States and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from the United States to and to perform in vaudeville in the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States, and after such travel have performed in vaudeville in the Dominion of Canada; and so plaintiff claims defendant to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the aforesaid Act of Congress; and a further part of the business in which said defendant is, and at all times herein mentioned has been, engaged consists in employing vaudeville performers to perform in vaudeville for the owners of the theatres hereinbefore enumerated as being in the Keith Circuit other than those owned or controlled and operated by the defendants Albee and Proctor; it is the agent of the owners and proprietors of such theatres and has done for them, and is doing for them, services in all respects similar to what it is doing and has done for said defendants E. F. Albee, Proctor and Murdock as hereinbefore described.

XXX. The business in which the defendant Orpheum Circuit, Inc., is, and its predecessor, Central Vaudeville Promo-
27 tion Company, was, and at all times since their incorporation have been, engaged consists in employing vaudeville performers to perform in vaudeville for defendant Meyerfeld, Jr., and Beck at the theatres owned or controlled and operated by them respectively as hereinbefore stated; it is the agent for said defendants in the City and Southern District of New York, and at all times herein mentioned, as such agent it has been engaged in entering into and conducting negotiations with vaudeville performers looking to and resulting in the employment of such performers to perform in vaudeville for said defendants at their respective theatres aforesaid; and as such agent for said defendants, from time to time, and as a regular part of its business, it has entered into and conducted negotiations with various and sundry persons who have been and are acting as managers and personal representatives of vaudeville performers; and among such managers and personal representatives of such vaudeville performers with whom said defendant has heretofore entered into and conducted such negotiations has been this plaintiff; that as a regula*t*or part of its business said defendant dealt with this plaintiff and through this plaintiff arranged for and procured contracts for the employment of various and sundry vaudeville performers for whom plaintiff was acting in the capacity of manager and personal representative as aforesaid, and in and by such contracts so procured said defendant as agent as aforesaid employed and agreed to employ said vaudeville performers to perform in vaudeville for defendants Meyerfeld, Jr., and Beck, respectively, at their aforesaid theatres throughout the United States. And in conducting the aforesaid negotiations looking to and resulting in the employment of said per-

formers as aforesaid, and as a part of its business, said defendant has caused and procured said performers to agree to travel from
28 one state to another state in the United States and to perform in vaudeville in such latter state; and as a result of such agreement said performers have traveled and do travel from one state to another state in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit, Germany, France, England, Australia and other countries to the United States, and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from the United States to, and to perform in vaudeville in, the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States to, and after such travel have performed in vaudeville in, the Dominion of Canada; and so plaintiff claims defendant to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the aforesaid Act of Congress; and a further part of the business in which said defendant is, and at all times herein mentioned has been, engaged consists in employing vaudeville performers to perform in vaudeville for the owners of the theatres hereinbefore enumerated as being in the Orpheum Circuit other than those owned or controlled and operated by the defendants Morris Meyerfeld, Jr., and Martin Beck; it is the agent of the owners and proprietors of such theatres and has done for them, and is doing for them, services in all respects similar to what it is doing and has done for said defendants Meyerfeld, Jr., and Beck, as hereinbefore described.

29 XXXI. Defendants B. F. Keith Vaudeville Exchange and Orpheum Circuit, Inc., unlawfully own, operate, dominate, control and maintain in the City, County and State of New York a booking exchange for vaudeville acts known as the "floor." The said "floor" consists of two parts, upon one of which acts, performers, entertainments and entertainers are booked upon the Orpheum and Keith Circuits, and in the other houses dominated by the defendants in what is known as the two-performances-a-day houses; on the other of the said parts acts, performers, entertainments and entertainers are booked upon the Orpheum and Keith Circuits, and in the other houses dominated by the defendants in what is known as the three-performances-a-day houses. The said booking exchange or "floors" were organized by the said defendants for the purpose and with the intent to unduly restrict competition and to unduly obstruct the course of trade in the said business conducted by the said defendants herein, and to unlawfully and improperly create a monopoly in the said business, and with the intent and purpose of giving to these defendants and their associates the practical monopoly of the entire high class vaudeville business in the United States of America; and the operation of said "floor" under the rules and regulations, con-

tracts and combinations entered into between the said defendants and the parties who are admitted to the privileges of using said "floors" or exchange had the effect of unduly restrictinng competition, and of unduly obstructing the course of trade in the said business in which the said defendants are engaged and of unlawfully creating a monopoly of the entire high class vaudeville business, and of the business of negotiating contracts for vaudeville acts, performers and entertainments in interstate commerce in the manner hereinafter more fully set out: that is to say, the said "floor" is
30 operated under a set of arbitrary and rigidly enforced rules and regulations made and enforced by the individual defendant and the defendants B. F. Keith Vaudeville Exchange and Orpheum Circuit, Inc., with which the proprietors of theatres, the managers and personal representatives of acts, entertainers, entertainments and performers, and the owners of such acts, entertainers, entertainments and performers are coerced into complying, under penalty of being blacklisted, and barred from future access to the said "floors" and from thereafter entering into any contract for the production of high class vaudeville entertainments with the said defendants, or any of the houses which they own, dominate or control. The said rules and regulations are in part as follows: All theatres constituting Keith and the Orpheum Circuits, and all other theatres doing business on said "floor," must book only performers, entertainers, entertainments and acts which are privileged to the booked upon the said "floor"; all managers and personal representatives must book only with the owners of theatres who are privileged to book upon the said "floor." That in order to be so booked the said acts must be in good standing with the said defendants herein, and must, if they have a manager or personal representative, be managed and represented by a person acceptable to the said defendants, and permitted to go upon the said "floor." That the said managers and proprietors of the said theatres are not entitled, and are refused admission to the said "floor" for the purpose of securing performers and acts, if they book acts or performers other than those privileged to book upon the said "floor," whether such bookings take place on said "floor" or elsewhere. That for the privilege of being allowed and permitted to secure booking upon the said Orpheum and Keith Circuits, all acts and performers must enter into a separate
31 agreement for each week of their performance, by the terms of which said contract for each week the acts and performers are to appear on the Keith Circuit, the B. F. Keith Vaudeville Exchange is entitled to and does unlawfully exact and receive a fee or payment of 5 per cent. of the entire gross salaries of, or compensation paid for the said acts and performers; and for each week that the said acts and performers appear on the Orpheum Circuit, the Orpheum Circuit, Inc., is entitled to and does unlawfully exact and receive a fee or payment of 5 per cent. of the entire gross salaries of, or compensation paid for the said acts and performers, and unless the owners of said acts and entertainments or their personal representatives and managers agree to this exaction, they are forever de-

barred from performing upon the Orpheum or Keith Circuits, or either of them, or of making contracts with the owners of any theatres owned, controlled or dominated by the said defendants whether such contracts are in fact negotiated upon said "floor" or elsewhere. That as a result of said unlawful practices on the part of the said defendants, the compensation which the said personal representatives and managers of said artists, actors, performers and proprietors of acts and entertainments in vaudeville is greatly reduced in, to wit: to the amount represented by said unlawful exaction. The securing of acts upon the said circuits is arranged through the manager or personal representative of the said acts and performers, who, if he be acceptable to the defendants herein, is permitted access to said "floor," where he meets the proprietor and/or booking manager of the said individual theatres comprising the said Orpheum and Keith Circuits. In order to be permitted upon the said "floor," the said personal representative and manager is required to enter into separate contracts with the defendants
32 Excelsior Collection Agency, Inc., and with Harry W. Gugler doing business under the name and style of Vaudeville Collection Agency, by the terms of which said contracts various amounts agreeable to the said Excelsior Collection Agency, Inc., and the said Harry W. Gugler are deducted from the earnings of the said personal representative and manager, and this, in the case of the plaintiff, was an amount equal to 2½ per cent. of the gross earnings of the performers and acts managed by him. If the manager or personal representative refused to accede to any of the rules or regulations herein, he is not permitted to appear upon the said "floor" and secure booking for the performers and acts he represented in any of the Keith or Orpheum Circuit Theatres, and further, that if the said manager or personal representative were refused admission to the said "floor" by reason of the fact that he was unacceptable for any reason to the said defendants herein, no act or performer entering into a contract with the said personal representative or manager engaging him as said personal representative or manager could secure employment upon the Keith and/or Orpheum Circuits.

XXXII. In or about the month of November, 1920, and for a long time prior thereto, and at all times since, at the City, County and State of New York, and Southern District of New York, the defendants herein entered into and at all times since have maintained an unlawful conspiracy and combination; the purpose, motive and effect of the said conspiracy and combination was to unduly restrict competition to unduly obstruct the course of trade, so then and since then carried on and conducted by the said defendants at the aforesaid theatres in the Keith Circuit and the Orpheum Circuit as aforesaid; and also to unduly restrict and obstruct the aforesaid business, so then and since then carried on and con-
33 ducted by the aforesaid owners and proprietors of the aforesaid theatres in the said Keith Circuit and Orpheum Circuit, other than those owned, managed and controlled by the aforesaid defendants, and from said date, and continuously at all times from said date, and until the date of the filing of this complaint, all of

the said defendants were and now are knowingly and wilfully engaged in the said unlawful conspiracy and combination, and in the furtherance of its unlawful object and purpose aforesaid, and so at all such times were continuously, and now are, engaged in an unlawful and corrupt conspiracy and combination in restraint of said business, trade and commerce, and for the purpose of unduly restricting competition in said business, unduly obstructing the course of trade in said business, and the purpose, motive and effect of said combination and conspiracy was and at all times herein mentioned has been and now is to secure the absolute monopoly of high class vaudeville business in each and all of the states of the United States of America and in interstate commerce, to the great and irreparable injury and detriment of this plaintiff and said unlawful conspiracy and combination was to be, has been and is being accomplished by said defendants as aforesaid in the manner and by the means following, to wit:

(A) By defendants E. F. Albee and Proctor and Murdock conspiring and agreeing together not to employ any person to perform for them in vaudeville at their respective theatres, owned, controlled and operated by them as aforesaid, except through the agency of the defendant B. F. Keith Vaudeville Exchange; and in and by these defendants adhering to and carrying out such agreement.

(B) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said B. F. Keith Vaudeville Exchange should not act as agent for the owner or proprietor of any of the aforesaid theatres in the aforesaid Keith Circuit where such owner or proprietor employed any person to perform in vaudeville at such theatre through any agency other than the defendant B. F. Keith Vaudeville Exchange; and in and by said defendants adhering to and carrying out such agreement.

(C) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together to cause, procure and compel all owners and proprietors of all the aforesaid theatres in the Keith Circuit aforesaid to promise and agree with said defendants not to employ any person to perform in vaudeville at their respective theatres aforesaid, except through the agency of the defendant B. F. Keith Vaudeville Exchange; and in and by said defendants adhering to and carrying out such agreement.

(D) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said B. F. Keith Vaudeville Exchange should not employ any person to perform in vaudeville at any of the aforesaid theatres in the Keith Circuit aforesaid if such person shall have performed in vaudeville in any theatre in the United States or the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and the Orpheum Circuit; and in and by said defendants adhering to and carrying out such agreement.

(E) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said United Booking Offices of America should blacklist any person who should per-

form in vaudeville at any theatre in the United States or
35 the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and Orpheum Circuit without its approval; and that such person having been so blacklisted should be debarred from thereafter performing at any of the aforesaid theatres in said Keith Circuit and Orpheum Circuit, and that the owners and proprietors of all theatres in said circuits should be notified of such blacklisting and forbidden to thereafter employ such performer under pain of being themselves blacklisted and thereafter being debarred from doing business with or through the United Booking Offices of America; and in and by said defendants adhering to and carrying out such agreement.

(F) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said United Booking Offices of America should not act as agent for the owner or proprietor of any theatre in the aforesaid Keith Circuit who should employ any person to perform in vaudeville for him or them after such person should have been blacklisted as aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(G) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together not to employ any person to perform for them in vaudeville at any of their respective theatres aforesaid when such person should be represented by or have in his or her employ as manager or personal representative any person who shall have obtained employment for any person to perform in vaudeville in any theatre in the United States or in the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and Orpheum Circuit aforesaid; and in and by said
36 defendants adhering to and carrying out said agreement.

(H) By defendants E. F. Albbee, Proctor, Murdock and the B. F. Keith Vaudeville Exchange agreeing together that said B. F. Keith Vaudeville Exchange should not act as agent for the owner or proprietor of any of the aforesaid theatres in the Keith Circuit aforesaid where such owner or proprietor should have employed any person to perform in vaudeville at his or their theatre when such person so employed was represented by or had in his or her employ as manager or personal representative any person who should have obtained employment in vaudeville for any performer at any theatre in the United States or the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and the Orpheum Circuit aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(I) By defendants E. F. Al'ee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said B. F. Keith Vaudeville Exchange should blacklist any person acting as manager or personal representative of vaudeville performers where such person should, as such manager or personal representative, obtain employment for any person to perform in vaudeville or otherwise in any theatre other than the aforesaid theatres in the Keith Circuit and Orpheum Circuit aforesaid, and that such person having been so blacklisted should be debarred from thereafter negotiating with

said B. F. Keith Vaudeville Exchange for the employment of any person to perform in vaudeville at the aforesaid theatres in said Keith Circuit, and that the owners and proprietors of all theatres in said circuits should be notified of such blacklisting and forbidden thereafter to employ any performer who employed or was repre-
37 sented by any such manager or personal representative so blacklisted under pain of being themselves blacklisted; and in and by said defendants adhering to and carrying out said agreement.

(J) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said B. F. Keith Vaudeville Exchange should not act as agent for the owner or proprietor of any theatre in the aforesaid Keith Circuit who should employ any person to perform for him or them in vaudeville when such person so employed was at the time of such employment represented by any manager or personal representative who should have been blacklisted as aforesaid; and in and by said defendants agreeing together to blacklist any performer who should employ any person as manager or personal representative who should have been blacklisted as aforesaid; and in and by adhering to and carrying out such agreements.

(K) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that said B. F. Keith Vaudeville Exchange should notify all owners and proprietors of the aforesaid theatres in the Keith Circuit aforesaid of all performers blacklisted as aforesaid, and that any owner or proprietor employing such blacklisted performer to perform for him or them in his or their theatre would not thereafter be able to employ any performers through the agency of said B. F. Keith Vaudeville Exchange, and by said defendants agreeing that said B. F. Keith Vaudeville Exchange should blacklist any owner or proprietor of any theatre who should employ any performer blacklisted as aforesaid; and in and by said defendants adhering to and carrying out such agreement.

38 (L) By defendants E. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange agreeing together that the defendant B. F. Keith Vaudeville Exchange should notify the defendant Orpheum Circuit, Inc., and formerly its said predecessor, of any and all performers, managers, personal representatives, owners and proprietors who should be blacklisted as aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(M) By defendants Meyerfeld, Jr., and Beck agreeing together not to employ any person to perform for them in vaudeville at their respective theatres owned, controlled and operated by them as aforesaid, except through the agency of the defendant Orpheum Circuit, Inc., and formerly its said predecessor; and in and by said defendants adhering to and carrying out such agreement.

(N) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that said Orpheum Circuit, Inc., and formerly its said predecessor, should not act as agent for the owner or proprietor of any of the aforesaid thea-

tres in the aforesaid Orpheum Circuit where such owner or proprietor employed any person to perform in vaudeville at such theatre through any agency other than the defendant Orpheum Circuit, Inc., and formerly its said predecessor; and in and by said defendants adhering to and carrying out such agreement.

(O) By defendant Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together to cause, procure and compel the owners and proprietors of all the aforesaid theatres in the Orpheum Circuit aforesaid to promise and agreement with said defendants not to employ any persons to perform in vaudeville at their respective theatres aforesaid, except through the
39 agency of the defendant Orpheum Circuit, Inc., and formerly its said predecessor; and in and by said defendants adhering to and carrying out such agreement.

(P) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessors, agreeing together that said Orpheum Circuit, Inc., and formerly said predecessors, should not employ any person to perform in vaudeville at any of the aforesaid theatres in the Orpheum Circuit aforesaid if such person should have performed in vaudeville in any theatre in the United States or the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and Orpheum Circuit aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(Q) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that said Orpheum Circuit, Inc., and formerly its said predecessor, should blacklist any person who should perform in vaudeville at any theatre in the United States or the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and Orpheum Circuit, and that such person having been so blacklisted should be debarred from thereafter performing at any of the aforesaid theatres in said Keith Circuit and Orpheum Circuit, and that the owners and proprietors of all of the theatres in said circuits should be notified of such blacklisting and forbidden to thereafter employ such performers under pain of being themselves blacklisted; and in and by said defendants adhering to and carrying out such agreement.

(R) By defendants Meyerfeld, Jr., Beck and Orpheum Cir-
40 cuit, Inc., and formerly its said predecessor, agreeing together that said Orpheum Circuit, Inc., and formerly its said predecessor, should not act as agent for the owner or proprietor of any theatre in the Orpheum Circuit who should employ any person to perform in vaudeville for him or them after such performer should have been blacklisted as aforesaid; and in and by said defendants adhering to and carrying out such agreement.

(S) By defendants Meyerfeld, Jr., and Beck agreeing together not to employ any person to perform for them in vaudeville at any of their respective theatres aforesaid when such person should be represented by or have in his or her employ as manager or personal representative any person who should have obtained employment for any person to perform in vaudeville in any theatre in the United States or the Dominion of Canada other than the aforesaid theatres

in the Keith Circuit and Orpheum Circuit aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(T) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that said Orpheum Circuit, Inc., and formerly its said predecessor, should not act as agent for the owner or proprietor of any of the aforesaid theatres in the Orpheum Circuit aforesaid where such owner or proprietor should have employed any person to perform in vaudeville at his or their theatre when such person so employed was represented by or had in his or her employ as manager or personal representative any person who should have obtained employment in vaudeville for any performer at any theatre in the United States or the Dominion of Canada other than the aforesaid theatres in the Keith Circuit and the Orpheum Circuit aforesaid; and in and by said defend-
41 ants adhering to and carrying out said agreement.

(U) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that said Orpheum Circuit, Inc., and formerly its said predecessor, should blacklist any person acting as manager or personal representative of vaudeville performers where such person should as such manager or personal representative obtain employment for any person to perform in vaudeville in any theatre other than the aforesaid theatres in the Orpheum Circuit and Keith Circuit aforesaid; and that such person having been so blacklisted should be debarred from thereafter negotiating with said Orpheum Circuit, Inc., and formerly its said predecessor, for the employment of any person to perform in vaudeville at the aforesaid theatres in said Orpheum Circuit, and that the owners and proprietors of all theatres in said circuits should be notified of such blacklisting and forbidden thereafter to employ any performer who employed or was represented by any such manager or personal representative so blacklisted under pain of being themselves blacklisted; and in and by said defendants adhering to and carrying out said agreement.

(V) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that said Orpheum Circuit, Inc., and formerly its said predecessor, should not act as agent for the owner or proprietor of any theatre in the aforesaid Orpheum Circuit who should employ any person to perform for him or them in vaudeville when such person so employed was at the time of such employment represented by any manager or personal representative who should have been blacklisted as
42 aforesaid; and in and by said defendants agreeing together to blacklist any performer who should employ any person as manager or personal representative who should have been blacklisted as aforesaid; and in and by adhering to and carrying out such agreement.

(W) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that the defendant Orpheum Circuit, Inc., and formerly its said predecessor, should notify all owners and proprietors of the aforesaid theatres in the Orpheum Circuit aforesaid of all such performers blacklisted

as aforesaid, and that any owner or proprietor employing such blacklisted performer to perform for him or them in his or their theatre would not thereafter be able to employ any performers through the agency of said Orpheum Circuit, Inc., and formerly its said predecessor, and by said defendants agreeing that said Orpheum Circuit, Inc., and formerly its said predecessor, should blacklist any owner or proprietor of any theatre who should employ any performer blacklisted as aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(X) By defendants Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that the defendant Orpheum Circuit, Inc., and formerly its said predecessor, should notify the defendant B. F. Keith Vaudeville Exchange of any and all performers, managers, personal representatives, owners or proprietors who should be blacklisted as aforesaid; and in and by said defendants adhering to and carrying out said agreement.

(Y) By defendants B. F. Albee, Proctor, Murdock and B. F. Keith Vaudeville Exchange, Meyerfeld, Jr., Beck and Orpheum Circuit, Inc., and formerly its said predecessor, agreeing together that the Orpheum Circuit, Inc., and formerly its said predecessor, as agent for the aforesaid theatres in the Orpheum Circuit aforesaid, should not employ any person to perform in vaudeville in any of the theatres in said circuit when such person should be blacklisted by the defendant B. F. Keith Vaudeville Exchange as aforesaid, and that the defendant B. F. Keith Vaudeville Exchange of America, as agent for the aforesaid theatres in the Keith Circuit as aforesaid, should not employ any person to perform in vaudeville in any of the theatres in said circuit when such person should be blacklisted by the defendant Orpheum Circuit, Inc., and formerly its said predecessor as aforesaid.

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(Z) By defendants B. F. Keith Vaudeville Exchange, E. F. Albee, Proctor, Murdock, Meyerfeld, Jr., Beck and Central Vaudeville Promotion Company entering into an agreement in writing with H. B. Marinelli, Limited, wherein and whereby, upon information and belief, in consideration of the discontinuance of an action theretofore brought and then pending in the United States District Court for the Southern District of New York, wherein H. B. Marinelli, Limited, was plaintiff and the defendants above named, together with Benjamin F. Keith, were defendants, for the recovery of the sum of $3,000,000 as damages, claimed by the plaintiff therein to have been sustained by reason of the violation by the defendants above named, except H. B. Marinelli, Limited, of the Act of Congress approved July 2nd, 1890, and entitled, "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies, etc.," the defendants above named, except H. B. Marinelli, Limited, granted to H. B. Marinelli, Limited, the sole and exclusive right, privilege and license to book all foreign acts that should or might thereafter play at or in any theatre comprised within the Keith or Orpheum Circuits as hereinbefore described; and in and by said defendants adhering to and carrying out said agreement.

44

(A-1) By the defendants B. F. Keith Vaudeville Exchange, E. F.

Albee, Proctor, Murdock, Meyerfeld, Jr., Beck, H. B. Marinelli, Limited, and Central Vaudeville Promotion Company agreeing together that H. B. Marinelli, Limited, should not enter into a contract for the presentation, performance or exhibition of any foreign act except as such theatres as are owned, operated or controlled by the other defendants, including those theatres comprised within the Keith and Orpheum Circuits as hereinbefore described; and in and by the said defendants adhering to and carrying out the said agreements.

(A-2) By all of the defendants herein entering into a combination, conspiracy and agreement to enforce compliance with the rules and regulations and to carry out the purposes, objects and intents for which the booking exchange herein described in paragraph XXXI of this complaint was organized and formed, and have at all times herein mentioned carried out the said agreement, conspiracy and combination.

XXXIII. Upon information and belief, that in or about the month of November, 1920, and thereafter, defendants herein unlawfully designing and wickedly contriving to injure plaintiff in his business aforesaid, and unlawfully designing and wickedly contriving to destroy plaintiff's said business, and to drive plaintiff out of said business, and of preventing him from thereafter conducting said business, and in furtherance of, and pursuant to the aforesaid unlawful combination and conspiracy, unlawfully declined and refused to book or to arrange for the employment of acts, performers, entertainers and entertainments managed or represented by plaintiff as aforesaid; declined and refused to allow plaintiff or any of plaintiff's agents or representatives upon the aforesaid "floor"; and declined and refused to enter into contracts with any act, performer, entertainer or entertainment or with the owner of any vaudeville act of any kind managed or represented by plaintiff, and have declined or refused to allow plaintiff to negotiate with acts, performers, entertainers and entertainments or proprietors belonging to or connected with the Keith and Orpheum Circuits, and notified plaintiff that all of said privileges had been withdrawn from him, and that he could not exercise any of said rights or privileges at any time thereafter; that acting in pursuance to the aforesaid unlawful combination and conspiracy, the said defendants at all times since have failed and refused to book any new acts, performers, entertainers and entertainments not already booked, managed or represented by plaintiff, or to rebook any of plaintiff's old acts, performers, entertainers or entertainments, and have failed and refused to enter into contracts with any act, performer, entertainer and entertainment managed or represented by the plaintiff for his or her appearance or presentation or performance in any of said theatres owned, operated, managed or controlled by said defendants aforesaid, and have failed and refused to enter into contracts with the owner of any vaudeville act, performer, entertainer and intertainment managed or represented by plaintiff; and at all times since said date all of the said defendants, in furtherance of said unlawful com-

bination and conspiracy, have failed and refused to book any
46 act, performer, entertainer or entertainment managed or represented by plaintiff, and have failed and refused to enter into contracts with the owner of any act, performer, entertainer and entertainment or with any act, performer, entertainer and entertainment managed or represented by plaintiff for its, his or her appearance or presentation or performance at any of said theatres owned, operated, managed and controlled by the said defendants as aforesaid; and in furtherance of said unlawful design to injure plaintiff in his business aforesaid, and to destroy plaintiff's said business, have cautioned all of the actors, performers and owners of vaudeville acts who had contracts with plaintiff that unless they terminated their relations with plaintiff and ceased to have him represent them as personal manager and representative, such performers, acts and owners of vaudeville acts could not thereafter appear, or have their acts appear, in any theatre belonging to or connected with the Keith or Orpheum Circuit; and plaintiff alleges, upon information and belief, that unless herein restrained by this Court from so doing, the defendants will continue so to do, thereby causing him irreparable injury, destroying his business and preventing him from engaging in said business during the remainder of his natural life.

XXXIV. That as a result of the aforesaid unlawful combination and conspiracy and the unlawful acts of the defendants in furtherance thereof as aforesaid, plaintiff's business each week has become and is becoming less valuable and is becoming entirely destroyed and plaintiff is becoming no longer able to represent acts, performers, entertainers and entertainments engaged in performing high class vaudeville in the United States and in the Dominion of Canada, or to obtain employment for anyone in any of the theatres aforesaid in the Keith and Orpheum Circuits aforesaid, by
47 reason thereof plaintiff's good will and his business aforesaid throughout the United States and the world has been and is greatly damaged.

XXXV. That by reason of the fact that plaintiff's entire life as aforesaid has been devoted to the business of being a personal representative and manager of acts, performers, entertainers and entertainments in high class vaudeville, and by reason of his specialization thereto, and the unusual proficiency he has attained therein, he cannot efficiently engage in any other class of business.

That unless the defendants are restrained from continuing in their unlawful monopoly and restriction of competition, and undue obstruction of the course of trade in the said business conducted by the said defendants herein, plaintiff's business will shortly be entirely destroyed and plaintiff will be unable to adequately engage in business.

XXXVI. That by reason thereof plaintiff has been damaged in the sum of $1,000,000, and in addition thereto in the further sum of $500,000, owing to the unlawful deduction of the 5 per cent of the gross earnings of all the acts, performers, entertainers and entertainments by the defendants, as set forth in paragraph XXXI hereof, and the further sum of $250,000, owing to the unlawful deduction of

the 2½ per cent of the gross earnings of all the acts, performers, entertainers and entertainments by the defendants, as set forth in paragraph XXXI hereof.

XXXVII. That plaintiff has protested against said unlawful acts and has urged, demanded and insisted that said acts of the defendants should cease, and that he should be permitted to continue
48 to carry on his business, but the defendants arrogantly refused to discontinue their actions, but persisted therein, and informed the plaintiff that he could not thereafter continue in said business.

XXXVIII. Notwithstanding said efforts of the said defendants to destroy plaintiff's business as aforesaid, the plaintiff has continued in his efforts to remain in said business and to enter into contracts for artists, actors, performers, entertainers and entertainments represented by him with the proprietors of theatres belonging to or connected with the said Keith or Orpheum Circuit, but the owners of said theatres, acting under the domination, control and coercion of these defendants, and the threats that they themselves would become blacklisted in the event that they negotiated with the plaintiff, have failed and refused to permit any act or acts, artists, performers, entertainers or entertainments represented by him to book at their respective theatres.

Wherefore, plaintiff demands judgment that the defendants, and each of them, their agents, servants, employees and officers, and each of them, be restrained and enjoined during the pendency of this suit and forever afterwards by an order and injunction of this Court from in any way, directly or indirectly, interfering with or preventing the participation of plaintiff in negotiating contracts for acts, performers, entertainers and entertainments in high class vaudeville; from interfering with and preventing proprietors and owners of theatres on the Keith and Orpheum Circuits and the theatres either owned or dominated by the defendants from giving employment to those acts, performers, entertainers and entertainments represented or managed by plaintiff; from refusing to give employment upon the aforesaid Keith and Orpheum Cir-
49 cuits, and in the theatres owned, dominated and controlled by the said defendants to the acts, performers, entertainers and entertainments represented or managed by plaintiff; from refusing plaintiff admission to the aforesaid "floor" and exchange, and participation thereon and therein in the affairs of high class vaudeville; from in any way discriminating against plaintiff or the acts that he may represent, from maintaining and operating the monopoly and obstruction of the course of trade in the said business conducted by the defendants herein, and the restriction of competition therein, as set forth in this complaint, and more particularly from the maintenance of the aforesaid "floor" and exchange under the unreasonable and unlawful rules and regulations as herein set forth, and from collecting and retaining from the acts, performers, entertainers and entertainments represented and managed by plaintiff, 5 per cent of the gross earnings of the said acts, performers, entertainers and entertainments for the alleged booking by or

through said defendants herein of said acts, and from requiring the payment of said 5 per cent of the said gross earnings of said acts, performers, entertainers and entertainments as aforesaid as a condition to the right of such entertainers to do business with the Orpheum and Keith Circuits and from collecting and retaining or requiring the collection or retainment of 2½ per cent of the gross earnings of the said acts, performers, entertainers and entertainments by the said Excelsior Collection Agency, Inc., and Harry W. Gugler, doing business under the trade name and style of Vaudeville Collection Agency, and from doing or performing each and every of the said unlawful acts complained of in this complaint, whether particularly set forth herein or not.

50 That plaintiff have judgment against the defendants, and each of them, for the damage and injury sustained by him by reason of the said unlawful acts herein complained of, in the sum of $5,250,000, together with an allowance as and for counsel fee as to this Honorable Court shall seem reasonable, together with the costs and disbursements of this action, and for such other and further relief as may be just and equitable.

And as the plaintiff is without adequate remedy save in a court of equity, plaintiff prays this Honorable Court to issue its writ of subpœna in due form, directed to the said defendants aforesaid and each of them, commanding them, and each of them, to appear before this Honorable Court and to make full, true and perfect answers to all and singular the matters and things hereinbefore set forth and complained of, but not under oath, an answer under oath hereby being expressly waived. Eppstein & Axman, Attorneys for Plaintiff, Office & P. O. Address, 175 Fifth Avenue, Borough of Manhattan, City of New York. Louis B. Eppstein, Laurence H. Axman, Solicitors for Complainant.

51 City, County and State of New York, *ss.*:

Max Hart, being duly sworn, deposes and says: That he is the above-named plaintiff; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Max Hart.

Sworn to before me this 25th day of May, 1921. Evelyn Greenfield, Notary Public. Bronx Co. No. 45; Reg. No. 2242. Cert. filed in N. Y. Co. No. 256; Reg. No. 2238. Term Expires March 30, 1922.

[Endorsement omitted.]

52 [Title omitted.]

Before Honorable Julian W. Mack, Circuit Judge (Holding District Court).

Martin W. Littleton, Esq., Louis S. Eppstein, Esq., and Lawrence H. Axman, for Plaintiff.

William F. S. Hart, Esq., for Defendant Proctor.

Maurice Goodman, Esq., for Defendant B. F. Keith Vaudeville Exchange.

Charles H. Studin, Esq., for Defendants Orpheum Circuit, Inc., Martin Beck, Frank Vincent and Excelsior Collection Agency.

J. Henry Walters, Esq., for defendants Reid A. Albee, Edward F. Albee and John J. Murdock.

Edward E. McCall, Esq., for Defendants Maurice Goodman and Harry N. Gugler.

MEMORANDUM OPINION.

[Filed Nov. 20, 1922.]

Julian W. Mack, Circuit Judge.

53 The Court (orally): Gentlemen, I have not prepared any opinion in this matter but the conclusions I reached yesterday, upon further study, are confirmed.

It seems to me that the question is not whether interstate commerce, interstate transportation of property and persons is necessarily contemplated and necessarily results from the transaction. Of course, it does. It does in the baseball case. There it was necessarily contemplated that there should be an interstate transportation of baseball players and interstate transportation necessarily results.

If the criterion laid down by Judge Hand in his decision in the Marinelli case had been adopted by the Supreme Court, this case would be clear, because it falls clearly within the Marinelli case. In my judgment however, the Supreme Court in the baseball case has not adopted that criterion, but it adopted one which prac-
54 tically is that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce; and in my judgment, that is so neither in the case of the defendants nor in the case of the plaintiff.

Of course, if the defendants conspired to ruin plaintiff's interstate commerce they would be just as guilty as if they conspired to monopolize for themselves interstate commerce, even though plaintiff were not engaged in it. It does not make any difference which side engages in the interstate commerce. But the defendants in my judgment, under the allegations of the bill and within the decision in the baseball case, are not engaged in interstate commerce; and neither is the plaintiff.

It is significant that, as to the plaintiff, it is not even expressly charged herein any paragraph of the bill, as it is in respect to the

several defendants, that he is engaged in interstate commerce; but of course, that is not a necessary allegation. I merely note that in passing. If the situation as to the plaintiff, as portrayed in the bill showed that he was engaged, in respect to the matters complained of, in interstate commerce, that would be sufficient.

But even though the plaintiff's activities that are disturbed by the defendants' alleged wrongful acts necessarily contemplate that there shall be a transportation of persons and goods in interstate commerce, as I read the bill—and of course, I confine myself now to the allegations in the bill—they are not dominantly interstate commerce.

Their object is to cause the artistic representations to be given not in one place but in many places, to be given in a series of places it is true. The giving of them in a series of places, just as
55 the giving of baseball games in a series of places, necessarily contemplates the transportation of persons and properties to and from those places. It may involve the actual purchase of the railroad tickets by the plaintiff on behalf of the performers, arranging for their transportation and any specific act of that kind may in itself be an act of interstate commerce. But all of those things are to my mind under the allegations of the bill incidental to the dominant purposes of the plaintiff's business, which is to act as broker on behalf of these performers in order to guard their interests and secure them their employments for what is an intrastate transaction.

It follows therefore, that both causes of action must be dismissed for want of jurisdiction over the subject matter stated in the bill in the Federal Court. Julian W. Mack, Circuit Judge.

[Endorsement omitted.]

56 [Title omitted.]

FINAL DECREE DISMISSING COMPLAINT.

[Filed Dec. 8, 1922.]

The issues in the action in equity herein having been duly brought to trial before Hon. J. W. Mack, Circuit Judge (holding District Court), at a Term of this Court held on the 31st day of October, 1922, all parties having appeared in person, and the defendants having moved to dismiss the complaint on the ground that this Court has no jurisdiction as a Federal Court of the subject matter of the complaint, and especially on the ground that the complaint does not set forth a cause of action arising under the Federal Constitution or under any Federal Law regulating commerce among the States, and the said question of jurisdiction having been argued by counsel, and it appearing upon the pleadings, and it being conceded that there is no such diversity of citizenship as would confer jurisdiction on the Court because of diversity of citizenship, and the Court being of the opinion that the complaint does not state a cause

of action under the Anti-Trust Laws of the United States, and that no other ground of jurisdiction appears from the record of this case, it is

57 Ordered, adjudged and decreed that the complaint in the equity action be and hereby is dismissed solely for want of jurisdiction in this Court of the subject matter of the complaint.

Dated, New York, December 8th, 1922. J. W. Mack, Circuit Judge holding District Court of the United States for the Southern District of New York.

[Endorsement omitted.]

CERTIFICATE OF JURISDICTIONAL QUESTION.

58 [Title omitted.]

[Filed Dec. 8, 1922.]

In this cause, I hereby certify that the judgment of dismissal herein is based solely on the ground that the cause set forth in the declaration in my opinion is not one arising under the Anti-Trust Laws of the United States, and no other ground of jurisdiction appears from the record in this case, and that the case is dismissed for want of jurisdiction for the reason above stated.

This certificate is made conformable to Judicial Code, Section 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

Dated, New York, December 8th, 1922. J. W. Mack, Circuit Judge holding District Court of the United States for the Southern District of New York.

[Endorsement omitted.]

ASSIGNMENT OF ERRORS.

59 [Title omitted.]

[Filed Dec. 13, 1922.]

The plaintiff in this action in connection with his petition for writ of error, makes the following assignment of errors which he avers exist:

1. The Court erred in sustaining the motion of defendants to dismiss the complaint.

2. The Court erred in dismissing the complaint.

3. The Court erred in dismissing plaintiff's complaint upon the ground that it did not have jurisdiction of the subject matter of the complaint under any law regulating commerce among the States, and that no other ground of jurisdiction appears in said complaint.

4. The Court erred in holding that it was without jurisdiction or power to entertain the suit, and in dismissing the complaint herein. Eppstein & Axman, Attorneys for Plaintiff.

[Endorsement omitted.]

PETITION.

60 [Title omitted.]

[Filed Dec. 13, 1922.]

The above named plaintiff, conceiving himself aggrieved by the decree made and entered on the 8th day of December, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, the 13th day of December, A. D. 1922. Eppstein & Axman, Attorneys for Plaintiff.

The foregoing claim of appeal is allowed.

Dated: December 13th, 1922. J. W. Mack, U. S. C. J.

[Endorsement omitted.]

ORDER AS TO RECORD.

61 [Title omitted.]

[Filed Dec. 18, 1922.]

Notice having been served upon the attorneys for the respective defendants herein by the plaintiff, and a hearing having been had before me, and the præcipe submitted by the attorneys for the plaintiff, having been considered by me, it is hereby

Ordered and adjudged that the record on appeal of the Supreme Court of the United States in this matter, shall consist, as set forth in the plaintiff's præcipe, of the following papers:

1. Complaint, as amended.
2. The opinion of Hon. J. W. Mack, Circuit Court Judge, sitting as District Court Judge herein.
3. Final decree.
4. Certification of Hon. J. W. Mack.
5. Plaintiff-appellant's assignment of error.
6. Petition for leave to appeal to Supreme Court of the United States.
7. Citation from the Supreme Court of the United States with proof of service upon the defendants-respondents.

Dated, New York, December 15th, 1922. J. W. Mack, U. S. D. J.

[Endorsement omitted.]

62 & 63 The President of the United States of America, ss; to B. F. Keith Vaudeville Exchange, Orpheum Circuit, Inc., Excelsior Collection Agency, Inc., Edward F. Albee, John J. Murdock, Frederick F. Proctor, Martin Beck, Frank Vincent, Reed Albee, and Maurice Goodman and Harry W. Gugler, doing business under the trade name and style of Vaudeville Collection Agency; Greeting:

Whereas Max Hart has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the District Court of the United States for the Southern District of New York, made in favor of you, the said B. F. Keith Vaudeville Exchange; Orpheum Circuit, Inc.; Excelsior Collection Agency, Inc.; Edward F. Albee; John J. Murdock; Frederick F. Proctor; Martin Beck; Frank Vincent; Reed Albee; and Maurice Goodman and Harry W. Gugler, doing business under the trade name and style of Vaudeville Collection Agency, and has filed the security required by law; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, within 30 days from the date hereof, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the Second Circuit, this 13th day of December, in the year of our Lord one thousand nine hundred and twenty-two. J. W. Mack, U. S. Circuit Judge.

[Omitted.]

63½ [Endorsed:] Copy Received Dec. 14, 1922. W. F. S. Hart, Atty. for F. F. Proctor. Chas. H. Studin, Atty. for Defs. Beck et al. Maurice Goodman, Atty. for defs. B. F. K. V. Ex., Edwr. E. McCall, Atty. for defs. Goodman and Gugler. J. Henry Walters, Atty. for Defs. E. F. Albee, Reid Albee, and Murdock. E. 21-353. United States Dist. Court of the Southern District of New York. Max Hart, Plaintiff, against B. F. Keith Vaudeville Exchange et al., Defendants. Original Citation. Eppstein & Axman, Attorneys for Plaintiff, 175 Fifth Ave., Borough of Manhattan, New York City. U. S. District Court, S. D. of N. Y. Filed Dec. 15, 1922.

64 [Title omitted.]

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern Dis-

trict of New York, this twenty-second day of December, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the said United States the one hundred and forty-seventh. Alex. Gilchrist, Jr., Clerk. [Seal of the United States District Court of Appeals, Southern District of New York.]

65 [Endorsed:] United States District Court, Southern District of New York. Max Hart, Plaintiff, vs. B. F. Keith Vaudeville Exchange, Orpheum Circuit, Inc., and others, Defendants. Transcript of Record on Appeal to the U. S. Supreme Court.

Endorsed on cover: File No. 29,313. S. New York, D. C., U. S. Term No. 763. Max Hart, appellant, vs. B. F. Keith Vaudeville Exchange, Orpheum Circuit, Inc., Excelsior Collection Agency, Inc., et al. Filed December 27th, 1922. File No. 29,313.

FILED
MAR 29 1923
WM. R. STANSB

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 763.

MAX HART,

Appellant,

vs.

B. F. KEITH VAUDEVILLE EXCHANGE; ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

LOUIS B. EPPSTEIN,
LAURENCE H. AXMAN,
Attorneys for Appellant.

MARTIN W. LITTLETON,
LOUIS B. EPPSTEIN,
of Counsel.

IRA W. HIRSHFIELD,
on the Brief.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6330.

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IN THE

Supreme Court of the United States

MAX HART, Appellant, against B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., et al., Respondents.	October Term, 1922—No. 763.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

This is an appeal from a decree (Record, p. 30) made and entered on the 8th day of December, 1922, in the District Court of the United States for the Southern District of New York in the above entitled cause dismissing the complaint solely for want of jurisdiction by that Court of the subject-matter of the complaint (Record, p. 32).

The suit was filed on May 27, 1921, and came on to be heard on December 6, 1922, before the Honorable Julian W. Mack, Circuit Court Judge, holding District Court of the United States for the Southern District of New York.

The complaint was dismissed before the submission of any testimony.

Upon the dismissal of the complaint the Trial Court filed a certificate to the effect that the judgment of dismissal herein is based solely on the ground that the cause set forth in the declaration in his opinion is not one arising under the Anti-Trust Laws of the United States, and no other ground of jurisdiction appearing from the record in this case, that the case was dismissed for want of jurisdiction for the reason above stated (Record, p. 31).

Statement.

The complaint among other things alleges that:

Plaintiff was engaged in business in the City of New York, as the personal representative of, and had a large and substantial interest in many vaudeville acts (p. 8).

The defendants are corporations, and their officers, directors and associates engaged in booking, producing and exhibiting vaudeville acts, and in operating and controlling vaudeville theatres and collection agencies (pp. 1-7).

The business, trade and commerce of producing vaudeville was alleged to be conducted by six classes of persons, and consists of:

(a) Authors of vaudeville acts or productions.

(b) The producers of vaudeville acts and productions.

(c) Performers.

(d) Managers or personal representatives.

(e) Booking agents or agencies.

(f) Theatre proprietors.

(A) The authors of vaudeville acts or productions are persons who conceive and create the script and/or action and/or arrangement of the acts.

The acts when so created are usually copyrighted, and the authors are the owners of the property rights in the property so created by them, and when copyrighted, have the exclusive right to print, reprint, publish, copy and vend the copyrighted work; to perform or represent the copyrighted work published; to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcript or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever.

The authors of the acts next attempt either to produce the act themselves, or to contract for its production.

(B) The producers of vaudeville acts or productions consist of individuals, co-partners or corporations engaged in the business of organizing and building vaudeville acts, and the production involves the acquisition from the author of the rights to produce; the purchase of such costumes, scenery, mechanical and electric effects or whatever may be necessary to produce the acts, and generally the employment of performers, and, finally, the direction and rehearsal of the act, until it becomes the

production conceived by the author, and is ready for booking.

When the production is ready for booking, the producer's next step is to secure contracts for such acts, and practically all negotiations for such contracts not only contemplate, but if successful, result in the transportation of such acts from State to State, throughout a part, if not all of the States and Territories of the United States of America and Canada.

(C) The class of performers embraces actors, acrobats, athletes, musicians, singers, jugglers, conjurers and a great many other entertainers.

(D) The class of managers or personal representatives embrace those who are regularly engaged as the personal representatives and business managers of those embraced in the foregoing two classes.

(E) The class of booking agents or booking agencies, embraces those agencies which arrange for contracts between the proprietors of theatres and the owners of acts and/or performers.

(F) The class of proprietors embrace the owners, lessees and proprietors of theatres and playhouses who are engaged in presenting vaudeville entertainment for hire; this latter class contracts with those embraced in the first, second and third classes for completed production, usually through the agencies of those embraced in the fourth and fifth classes (pp. 7-8).

The defendants are alleged to have entered into and maintained an unlawful conspiracy and com-

bination to unduly restrict competition and to unduly obstruct the course of trade in said business with the purpose, motive and effect of securing the absolute monopoly of all of the high-class vaudeville business in each and all of the States of the United States of America, and in interstate commerce (p. 16).

The following were a few among the means adopted for carrying out the purpose of the combination and conspiracy:

(a) Agreeing among themselves, and with others, not to book any vaudeville acts nor permit any vaudeville act to be booked for any theatres, except through the agency of the defendants.

(b) Agreeing among themselves, and with others, not to book for any theatre who did not book exclusively through such defendants.

(c) Conspiring to compel and compelling all theatres in the United States not to book any act except through the agency of the defendants, and to blacklist and refuse to book any act which contracted through any other agency.

(d) By conspiring to force the theatre owners and act owners, respectively, to refrain from contracting with any theatre owner or act owner that was so blacklisted, under pains of being themselves blacklisted and debarred from doing business with or through the defendants, and by carrying out such conspiracy.

(e) By blacklisting all personal representatives of vaudeville acts, owners of vaudeville acts, and

owners of vaudeville theatres who fail to comply with their rules and regulations which in turn prohibited all persons engaged in such business from contracting through any other agency than said defendants or with any person who contracts through any other agency, and preventing all persons so blacklisted from contracting in said business.

(f) By agreeing to exact and exacting unconscionable tributes from all classes of persons engaged in such business as a condition precedent to their right to engage in or remain in said business (pp. 17, 18-25).

(g) A personal representative of vaudeville acts was permitted to do business with defendants only at the will of the defendants upon receiving what was designated in the business of the defendants as a franchise, which was given and revoked by the defendants at their own will (p. 17).

That as a result of such combination and conspiracy, they have acquired control and dominate practically all of the theatres in the United States and Dominion of Canada at which high-class vaudeville entertainments are produced (p. 8).

That no high-class performer or act who was debarred from doing business through the defendants could obtain sufficient employment in vaudeville in the United States and Dominion of Canada in theatres in which high-class vaudeville was produced from which to earn a living (pp. 8-9).

Plaintiff had developed a lucrative and profitable business and represented a great number of vaudeville acts in addition to his own, and his business

was growing, when in November, 1920, defendants revoked his franchise and refused to permit him to further do business.

Now, as a result of the defendants' unlawful acts, plaintiff is disabled from competing in the market, and his business is restricted and unprofitable, and is rapidly being destroyed (p. 26).

Specifications of Error.

1. The Court erred in sustaining the motion of defendants to dismiss the complaint.

2. The Court erred in dismissing the complaint.

3. The Court erred in dismissing plaintiff's complaint upon the ground that it did not have jurisdiction of the subject-matter of the complaint under any law regulating commerce among the States, and that no other ground of jurisdiction appears in said complaint.

4. The Court erred in holding that it was without jurisdiction or power to entertain the suit, and in dismissing the complaint herein.

BRIEF OF ARGUMENT.

POINT I.

The Court erred in decreeing that it was without jurisdiction to hear and determine this suit.

The issue involved in this appeal is sharply defined and involves but one question.

The Trial Court held that the complaint in this case did not show a combination or conspiracy in restraint of interstate trade or commerce, and it being conceded that there was no such diversity of citizenship as would confer jurisdiction upon the Court, and no other ground of jurisdiction of the parties or subject-matter of the suit appearing in the record, that it had no power to hear and determine this cause of action.

It cannot be questioned that the complaint alleges acts on the part of the defendants of such character as to restrain, control and monopolize the entire vaudeville business, nor that many of the transactions involved in such business are interstate in character.

It therefore follows that the sole question involved in this appeal is whether the business activities so restrained, or any of them, comes within the definition of "trade" or "commerce."

The Federal Courts have often defined interstate trade and commerce. An excellent resumé of these decisions may be found in the opinion of Mr. Justice Sanborn, who, in *United Leather Workers In-*

ternational Union v. *Herkert & Meisel Trunk Co.*, 284 Fed. Rep., at page 449, says:

> "Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfill his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 246, 20 Sup. Ct., 96, 109 (44 L. ed. 136).
>
> Indeed, the established rule is that 'interstate commerce,' within the meaning of that term in the Constitution and the Anti-Trust Act, embraces more than the mere sale, exchange and interstate transportation of the goods. It includes intercourse, it comprehends every contract, trade and dealing between citizens of one state and those of another which contemplates the transportation of goods, persons, or information from one state into another, and every initiatory, negotiating and intervening act of the parties to that trade or deal from the time the intercourse relating to it commences until the transportation and delivery have been completed. Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed., 1, 17, 84 C. C. A. 167; International Text-Book Co. v. Pigg, 217 U. S. 91, 107, 30 Sup. Ct. 481, 54 L. ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct., 106, 108, 66 L. ed. —; United States v. Reading Co., 226 U. S. 324, 367, 368, 33 Sup. Ct. 90, 57 L. ed. 243; Hopkins v. United States, 171 U. S. 578, 598, 19 Sup. Ct., 40, 43 L. ed. 290;

United States v. Swift & Co. (C. C.), 122 Fed. 529, 631; Welton v. State of Missouri, 91 U. S. 275, 23 L. ed. 347; Caldwell v. North Carolina, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. ed. 336; United States v. Tucker (D. C.), 188 Fed. 741, 742; Marienelli v. United Booking Offices of America (D. C.), 227 Fed. 165; In re Selman Heating & Plumbing Co. (D. C.), 204 Fed. 839, 840, 841-843; Robbins v. Shelby Taxing District, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. ed. 694; Globe Elevator Co. v. Andrew (C. C.), 144 Fed. 881, 882."

In *National League* v. *Federal Baseball Club*, 269 Fed. Rep. 681, the Court of Appeals of the District of Columbia uses the following formula:

"'The word "trade" in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally.' May v. Sloan, 101 U. S. 231, 237. It means 'the buying as well as the selling of property.' United States v. United States Steel Corporation et al., 223 Fed. 55, 177. Webster's Dictionary defines trade as 'the act or business of exchanging commodities by barter; the business of buying and selling for money; commerce, traffic; barter;' and says that 'commerce, in its simplest signification, means exchange of goods, * * *.' It may be said to be trade, traffic or exchange between different places and communities. And, according to the Century Dictionary, commerce is defined as 'interchange of goods, merchandise, or property of any kind; trade; traffic.' 'Commerce, briefly stated, is the sale or exchange of commodities.' United States v. Swift & Co., 122 Fed. 529. Substantially the same definitions are given in the case of United States v. E. C. Knight Co., 156 U.

S. 1; Gibbons v. Ogden, 9 Wheat. 1, 189, 190; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; In re Charge to Grand Jury, 151 Fed. 834.

Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another. The concomitant of this concept is the principle approved by the Supreme Court of the United States, that 'importation into one State from another is the indispensable element, the test, of interstate commerce.' International Textbook Co. v. Pigg, 217 U. S. 91."

The defendants, however, rely upon the case of *Federal Baseball Club of Baltimore* v. *National League,* decided by the Supreme Court of the United States on May 29, 1922, which they contend distinguishes the business activities of this case from those referred to in the above formulae.

Mr. Justice Holmes, speaking for the Court in that case, said:

"The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give exhibitions, the Leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business. According to the distinction insisted upon in Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, the transport is a mere

> incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which, in its consummation, is not commerce, does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustration given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state.
>
> If we are right, the plaintiff's business is to be described in the same way; and the restrictions by contract that prevented the plaintiff from getting players to break their bargains, and the other conduct charged against the defendants were not an interference with commerce among the states."

We contend, however, that this case simply reannounces the fixed rule that interstate trade or commerce must involve transactions or negotiations contemplating and/or resulting in the transfer, across State lines of some commodity, *i. e.*, a product of "human effort," or such as *directly* affect the transfer of persons, property or intelligence, across State lines, and that it further points out that transactions with reference to "personal effort" not related to production is not "trade" or "commerce," and that therefore baseball exhibitions, though given in different States, while undoubtedly they cause or result in the transportation of free persons across State lines, do not become

"trade" or "commerce" because of such transfer. In other words, a baseball exhibition is not a commodity—it is not an article of trade or convenience; it is not something that is bought and sold; it is not an element of economic wealth, nor is it composed of commodities; nor does a baseball exhibition produce anything that can be bought or sold; it does not result in any product that can be exchanged or traded in.

So, for the purpose of this argument only, we might even concede that the business of giving theatrical exhibitions in vaudeville theatres may not be commerce, just as we might concede that the business of giving exhibitions of motion pictures by means of films in motion picture theatres may not be "trade" or "commerce," or that the music rendered in any theatre by means of phonographic records or by piano played rolls, or other devices, may not be "trade" or "commerce," but we most emphatically insist that the *supplying* or *contracting* for the transfer across State lines of phonographic records, piano player rolls or other devices for operating automatic players, and for motion picture films for use in motion picture theatres, and for vaudeville acts for use in vaudeville theatres, is interstate commerce.

For, a vaudeville act or production, as defined by this complaint, is essentially *a product* of human labor; it is a *commodity* in which the property rights of the owners are recognized and protected by law. It is a commodity that is bought and sold, licensed and rented for hire; it is an element of economic wealth; it is property.

Let us see what a vaudeville act is:

(a) It is generally the work of an author or creator; his property rights in the act are protected by the copyright laws of the United States.

(b) Next, the producer, after acquiring the right from the author to do so, proceeds to build and equip the act by purchasing or manufacturing the necessary costumes, scenery, mechanical and electrical effects, and other properties required.

He also engages artists, stage directors, electricians, and whatever other persons are necessary for the production, and rehearses them in connection with the properties of the act, and all of these things together, that is to say, the work of the author, the scenery, costumes, mechanical, electrical or other properties necessary to produce the act, together with the actors, electricians and mechanics required for its production, working together, constitute the act.

It is an entity—the act is not complete if any of these elements are missing—and it is as such entity that it is booked, bought, sold or otherwise contracted for.

The complaint expressly alleges that—

> "Such acts are generally booked in New York, and contracts contemplate and result in the transportation of the act, which, of course, includes the persons, performers, scenery, music, costumes, and whatever constitutes the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said business has grown to such pro-

> portions, that there is a contant stream of commerce in and among the States, and from State to State, and through the various territories of the United States, in said business.
>
> The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases the use of large quantities of accessories, and special transportation equipment and facilities."

It is true that a contract booking an act often involves the services of various persons, and to that extent may be said to be a contract involving "personal effort," but it is also unquestionably true that it is something more than this, and that it involves, as well, the other elements which constitute the act, namely, the scenery, costumes and mechanical appliances, and everything necessary to constitute the entire act, as well as the right legally to use all of these things together.

The actors engaged in a copyright act, in which special costumes, properties, electrical equipments and scenery are involved, are obviously not the act, nor could they produce the act without the equipment necessary for its production, and even if they had these, they could not legally produce it without the authority of the owner of the copyright.

Of course, the presence of the artists or performers required in the production of an act is an essential element of the contract, and without them the act could not be produced according to the contract. It is equally clear, however, that the properties necessary for the production of the act, which in many cases consist of large quantities of accessories for the transportation of which special transportation equipment and facilities are required, are

also essential elements of the contract, and that the act could not be produced without them.

A contract made in New York booking an act for appearance in other States, provides, in effect, that the owner of the act will cause all of the persons and all of the properties which were exhibited by him in New York to be transported from New York to such other State, and that after their arrival at such other State they will be utilized for the purposes agreed upon.

It follows, therefore, that a booking contract made in New York, for a particular act, which consists in part of costumes, scenery, mechanical, electrical or other equipment, elephants, lions, seals, horses, dogs or other animals, for theatres in Cleveland, St. Louis and San Francisco, is a contract involving the transportation of that property in interstate commerce, just as fully as a contract for the delivery of the costumes or scenery involved in such acts, or of chairs to be used in such theatres, would be.

Although the complaint alleges that vaudeville acts generally consist of properties, scenery, costumes and other products of labor, as well as artists and others employed in the production, it is a matter of common knowledge that some vaudeville acts require the use of comparatively few properties. Among these are monologue and other acts of like character. Such an act obviously comes more nearly within the principle of the baseball decision than any other.

Contracts for such acts, in their consummation, involve personal effort, and to the least degree of any, the transportation of commodities, but even these generally require the use of specially made costumes, make-up and some properties, and in most

cases, the copyrighted work of an author, and they are contracted to be produced in identically the same manner as when exhibited for contract. In other words, it is the act that is contracted for, and is transported from State to State.

On the other hand, a great many acts consist of elaborate appliances, mechanical and electrical, as well as special stage settings; and/or animals, such as Powers' Elephants, Woodwards' Seals, Barnolds' Dogs, "Old Ninety and Nine" or "The Toonerville Trolley." The two last mentioned include the engine on the one hand, and the trolley car and tracks on the other, as well as movable platforms, shifting panoramic scenery and what not.

In many of these acts the human element is shifted at will, and it is the mechanical device which constitutes the act.

Take, for instance, the act known as "Sawing a Woman in Two," the most essential element of this act is the paraphernalia and stage settings required to produce the illusion. Without this paraphernalia, the act obviously is not complete, and could not be produced at all, and the owner of this act may well have five, six or a dozen of his acts produced simultaneously throughout the United States employing the personal element required locally, or as he may find convenient.

Defendants will doubtlessly contend that the persons engaged in giving exhibitions of baseball employ uniforms to distinguish them from one another, and that in playing the game they use bats and balls and other paraphernalia which they may and frequently do transport from State to State, but it was not claimed in the baseball case that the defendants unduly control or restrain the traffic in uniforms or balls or bats, or any other product

of human labor. No person engaged in the manufacture of uniforms, of balls, bats or of any other product of human labor has complained of any misconduct on the part of the baseball club with respect to trade in such commodities. The business which they are charged with having monopolized is the business of giving baseball exhibitions, and that business is one which obviously and essentially consists of a series of contests.

The plaintiff in that case was another organization engaged in the same character of business.

It is true the plaintiff complained of alleged misconduct of the defendants in that case and charged them with having monopolized or having secured a monopoly of the business, but it was not even contended that the defendants prevented plaintiff from freely securing every character of commodity required by plaintiff in its business.

What was complained of was that the defendants had monopolized the supply of ball players; in other words, that they had obtained exclusive contracts for the services of players in baseball exhibitions, but such services were obviously unrelated to production of any kind.

Clearly, there was no *restraint of interstate trade* in that case, although defendants doubtlessly, in the conduct of their business, caused persons and property to be transported across State lines.

In this case the defendants are restraining the entire business of dealing in and of contracting for vaudeville acts, and the people complaining are in the business of manufacturing and owning such acts, and of contracting for such acts in interstate commerce, and are directly injured by the restraint of trade in the very commodity in which they are dealing.

The defendants, however, contend, and the Court below adopted their view, that in order that a transaction may be interstate commerce, "the dominant object of the parties in respect to the matter complained of must affect or be interstate commerce," and the Court further held, in effect, that since the dominant object of the defendants was to procure materials for use in intrastate vaudeville exhibitions, and inferentially, that intrastate or local vaudeville exhibitions were not trade or commerce, that procuring such material could not be interstate commerce.

The holding of the lower Court was the result of that Court's effort to distinguish those decisions which hold that every transaction *of trade or commerce* which contemplates and results in the transportation of persons, property or intelligence across State lines is interstate commerce, from those which hold that business activities which do not come within the definition of trade or commerce do not become interstate trade or commerce, because incidentally they may result in, cause or become the occasion for the transportation across State lines of persons, intelligence or property.

This Court has held in a great number of cases, of which *Hooper* v. *California*, 155 U. S. 648, is usually cited, that certain negotiations or business transactions, such as the execution of a contract for insurance or the giving of a baseball exhibition, do not come within the definition of "trade" or "commerce," and the Court has also held that since an insurance contract is not "trade" or "commerce," the act of a broker in negotiating such a contract and procuring the delivery of the policy by interstate agencies does not transform the contract into interstate commerce, and since the business of giv-

ing baseball exhibitions is not "commerce," it does not become interstate commerce, because it incidentally results in causing free persons to go from State to State.

In the first instance, they hold that the insurance policy is nothing more than the evidence of a contract, and is not property that is being dealt in, and in the second, they hold expressly, that the business of giving exhibitions of baseball is purely local, and does not constitute "trade," and that the transportation of the players does not change the nature of the business.

In none of these cases do the contracts themselves or the combinations or conspiracies complained of, restrict or restrain the free traffic in any commodity.

Our position is simply this:

The Anti-Trust Laws *forbid every combination, conspiracy, etc., in restraint of interstate commerce or trade.*

If the business activity of the defendants does not come within the definition of trade or commerce, and if they have entered into no combination, contract or conspiracy that restrains interstate trade or commerce, obviously these laws cannot apply.

But, since we have shown that they have entered into contracts, combinations and conspiracies, the purpose and result of which has been to unduly restrain, control and monopolize the entire market for vaudeville acts, and to restrict and restrain the traffic in such acts, we most emphatically insist that any other purpose or object that they might have had is wholly immaterial.

This Court, moreover, has held in no unequivocal terms, that every restraint of trade that is direct and is undue, falls within the prohibition of the statute.

Without multiplying the authorities on this subject, we will content ourselves by quoting from the *Standard Oil* case, 221 U. S., page 1, in which the Court says:

> "To fall within the prohibitions of the statute it is necessary that the unlawful restraint of trade—and this is not always the same thing as the mere restraint of competition—should be direct, and not merely incidental, and should also be undue and unreasonable. If it be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief. There are many methods by which trade may be unduly restrained, and among these are contracts or combinations to fix and maintain prices or to boycott the goods of a manufacturer or other dealer. U. S. v. Keystone Watch Case Co. (E. D. Pa. 1915), 218 Fed. 502, wherein the Court held that the action of a corporation manufacturer of watch cases in selling goods exclusively to selected jobbers who complied with their request to sell at a fixed price and in effect forbidding such jobbers to deal in watch cases made by other manufacturers, was an unlawful restraint of trade."

Testing the case at bar by this rule, we find the following facts to be undisputed:

Defendants are engaged in the business of acting as middlemen between the owners of vaudeville acts and the owners of vaudeville theatres.

Their sole function, in booking acts, is to procure material for the theatres and negotiate contracts with the owners of the act for the hire of their acts. For their service they charge fees to the owners of the theatres and also to the owners of the act.

The contract necessarily contemplates and results in the transportation of the act from State to State continuously.

It may be conceded that after a vaudeville act arrives in a State it is engaged in purely intrastate transaction, but we again insist that, since the *act* consists of property, and since the contract expressly or necessarily contemplates and results in the transportation of that property from State to State, that the transaction is an ordinary transtion of interstate trade, and that the fact that after the act arrives within the State it may be utilized for purposes that are purely intrastate or for purposes which do not themselves constitute "trade" or "commerce"—if it be used for charity, pleasure or for entertainment—that that does not in the slightest degree change the nature of the transaction by which it was induced to go from one State to another.

We do not wish to be understod as conceding that the business engaged in by the owner of a vaudeville theatre is not trade or commerce.

We have not discussed that question because we do not believe that it is involved in this appeal.

But we desire in this connection to call attention to the very clear distinction between the contractual relations of the owner of a vaudeville theatre with the public and those which he has with the owner of a vaudeville act.

In the first place, the patrons who attend his theatre receive nothing except amusement and entertainment.

In the second place, however, the owner of a business operated solely for gain contracts with the owner of property for the use of that property in his business enterprise.

The owner of the theatre pays for the property and/or for the rights to use it and utilizes it in the regular course and conduct of his business for profit.

It certainly cannot be said of him that he does not receive and use property.

In the operation of his theatre he requires many such products of labor such as chairs, tickets, scenery, vaudeville acts, films and advertising matter.

All of these things are commodities which he purchases in the market and all of them are used by him in the operation of his business.

A very similar state of facts was discussed in the case of *Marienelli* v. *United Booking Offices*, 227 Fed. Rep., page 167.

In that case, in which the activities of these same defendants was being discussed, Judge Learned Hand says:

> "The combination or conspiracy is alleged to be in restraint of the defendants' business, and the first inquiry must be of the nature of the business. Undeniably certain aspects of the business are interstate commerce, as, for instance, the contracts made by the booking companies under which the performers must go from state to state, throughout the circuit, acting here and there, and fulfilling their contracts as much

> by the travel as by the acting. Since Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913 E, 905, and Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728, it cannot be doubted that this feature of the business was within the complete powers of Congress, for such purposes as it might find to the public interest. This, moreover, applies as well to that feature, incidental to the foregoing, which consists in the carriage of the performers' stage properties and paraphernalia from one state to another, a necessary part of the performance of their contracts with the defendants. The Lottery Cases, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. The same may be said of the scenery and advertising matter sent from state to state by the theatres themselves. In respect of all these details the business, therefore, consists of interstate commerce."

This case was cited by the Court of Appeals of the District of Columbia in *The National League of Professional Baseball Clubs* v. *The Federal Baseball Club of Baltimore*, 48 Wash. Law Rep., at page 821:

> "Much stress is laid by the appellee upon Marienelli v. United Booking Offices, 227 Fed. 165, and International Textbook Co. v. Pigg, ante, but we think they are not in point. In the first case the combination was between a series of theatres and persons engaged in theatrical brokerage, according to which the brokers had the exclusive right of acting for the theatres in booking performances on an interstate schedule. The entire business consisted in the negotiation of a contract to travel and perform. The brokers

were not interested in the service rendered or the skill exhibited by the performers. The Court stressed this feature and distinguished the case before him from the Hammerstein case, ante, by saying that the trade and commerce element in the case he was considering was essential, while that element in the Hammerstein case was but incidental. For the same reason the Marienelli case is distinguishable from the case before us."

The complaint in this case, moreover, differs from the complaint in the *Marienelli* case in this—that it defines *the vaudeville act* to be the commodity which is being traded in, and we contend that the business consists of something more than "a contract to travel and perform." It consists of negotiations for the transportation of property from State to State, as well as the use of the property upon its arrival.

The complaint, after alleging that the act is first the work of an author or creator, and next of a producer who manufactures or purchases the properties required for the act and produces it, expressly alleges:

> "As a further part of the aforesaid business, trade and commerce, said theatre proprietors enter into contracts with the producers and owners of vaudeville acts wherein and whereby such acts are contracted for to appear at said proprietor's theatres. Said contracts are known as and referred to as 'booking contracts.'
>
> Such acts are generally booked in New York, and the contracts contemplate and result in the transportation of the acts, which, of course, include the performers, scenery, music, costumes, and whatever constitutes

> the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said business has grown to such proportions, that there is a constant stream of commerce in and among the States and from State to State, and through the various Territories of the United States, in said business.
>
> The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases the use of large quantities of accessories, and special transportation equipment and facilities" (p. 8).

So it is quite evident that it is *the act* that is contracted for, and not the performers.

In carrying out his contract, the owner of the act, which may be a corporation, partnership or individual, and may never have been a performer, must cause *the act* to be transported from State to State, and upon its arrival comply with the conditions of the agreement.

It is more than a mere agreement to travel and perform—it is an agreement to transport property, as well as persons, and to cause an entity controlled by the owner to function in accordance with the terms of the contract, for which the owner receives payment, and the owner of the theatre receives the use of the owner's property, in a business conducted by him for gain.

It may be contended that a contract booking a vaudeville act includes the producing of the act when it arrives at its destination, and that after it arrives the completion of the booking contract involves only personal effort unrelated to production. This, however, is not true, because it also involves

the other elements constituting the act which we have shown constitutes and is property.

It may further be contended that since the contract involves in part elements which are purely intrastate or which may fall outside of the definition of trade or commerce, that the entire transaction even in so far as it directly involves interstate commerce is relieved from the effect of the statute.

But if such disguises as these can effect this result, it must follow that every transaction in interstate commerce except such as directly provide for the transportation of commodities, persons or intelligence from State to State must be similarly affected.

Almost every consignment of merchandise across State lines contemplates the ultimate use of such merchandise in purely intrastate transactions.

Billboard advertising, after the posters arrive, is purely local in its nature, and after it is posted, though it obviously affects trade, is not itself trade or commerce, and this is doubly true of such posters as advertise baseball exhibitions and possibly theatrical productions.

Harvesting machines, motion picture films, photographic cameras and other commodities, when shipped from State to State under contracts providing for their use locally, would fall within such a rule, particularly if an operator was sent along to operate and control the machine.

As we have said before, it seems too obvious for discussion that the use to which an article of commerce is put after its arrival at its destination cannot affect the character of the transaction which resulted in its transfer across State lines.

If the contract itself directly involves, that is to say, if it contemplates and results in the transportation of property from one State to another, it is a contract affecting interstate commerce.

This Court in a very recent case—*Rankin* v. *Associated Bill-Posters,* decided January 2, 1923—has discussed this very question:

> "The court below held: 'the business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by the billposters is a purely local service not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'
>
> We cannot accept this view. The alleged combination is nation-wide; members of the association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states, and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. Hopkins v. United States is not applicable. There the holding was that the rules, regulations and practices of the association direct affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in

posters to channels dictated by the confederates to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding non-competitive prices. The allegations clearly show the result has been as designed—that the statute has been violated and plaintiff's business has suffered.

This Court has heretofore laid down and adequately discussed the applicable principles. W. W. Montague & Co. v. Lowry, 193 U. S. 38, 45, 46, 48 L. ed. 608, 611, 612, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 293, et seq. 52 L. ed. 488, 496, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815, Gompers v. Buck's Stove & Range Co., 211 U. S. 418, 438, 55 L. ed. 797, 804, 34 L. R. A. (N. S.) 874, 31 Sup. Ct. Rep. 492; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 609, 58 L. ed. 1490, 1498, L. R. A. 1915 A, 788, 34 Sup. Ct. Rep. 951. See also United States v. Associated Bill Posters, 235 Fed. 540. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopoly and combinations in restraint of trade. The alleged actions of defendants are directly opposed to this beneficient purpose and are denounced by the statute."

The analogy of the case at bar to that case is complete.

The alleged combination is nation-wide. The defendant and others are bound by an agreement and forced by threats to pursue a certain course of business designed and adequate to interfere

with the free flow of commerce among the States and with Canada.

As a direct result of defendants' joint acts, plaintiff's business has been greatly limited or destroyed.

The purpose of the combination here challenged is to destroy competition and to secure a monopoly by limiting and restricting, among other things, commerce in vaudeville acts to channels dictated by defendants and their confederates, and to exclude from such trade the undesired, including the plaintiff, and to enrich its members by exacting unconscienable tributes, and by controlling and regulating prices.

The allegations clearly show the result has been as designed, and that the statute has been violated, and that plaintiff's business has suffered. Plaintiff is shown to be engaged in the business of owning vaudeville acts which have been excluded from booking; he is further shown to have been engaged in the business of representing large numbers of vaudeville acts in interstate commerce, and they are shown to have been excluded from obtaining business unless they severed their connection with the plaintiff.

Since a vaudeville act is shown to be a commodity, or property, the restraint alleged is clearly direct and undue.

Although we most emphatically dissent from the proposition that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce in order to bring their acts within the prohibition of the statute, and insist that the true rule is that every combination or conspiracy which directly and un-

duly restrains trade is prohibited, no matter what the dominant object of the parties to the conspiracy may be, we nevertheless insist that in this case it was obviously the dominant object of these defendants and their confederates to control these markets and restrain and restrict this trade, so that they might absolutely dominate and control it, and that they have by unlawful means effectually accomplished that object.

Upon the trial, the defendants cited the case of *Harms* v. *Cohen*, 279 Fed. Rep., page 276, as authority for the proposition that a combination of composers, authors and publishers to demand extortionate license fees for profit of musical numbers copyrighted by the various members, did not constitute a violation of the Sherman Act.

In that case, the Court, after discussing whether the giving of a performance of a musical composition was "trade" or "commerce" any more than producing plays, grand opera, or the giving of baseball exhibitions were, cited *People* v. *Klaw*, 106 N. Y. Supp. 341; *Metropolitan* v. *Hammerstein*, 162 App. Div. 691; *National League* v. *Federal Baseball Club*, 269 Fed. Rep. 681, and continued as follows:

> "The material object, the sheets of music, are not involved. If, therefore, the material object is not involved, so far as the defendant is concerned, the answer does not show that *interstate commerce* is directly affected by the combination, and it is therefore no defense. Citing Hopkins v. United States, 171 U. S. 578; Blumenstock v. Curtis, 252 U. S. 436." (Italics ours.)

But, in this case, *the vaudeville act* does consist of material objects—of tangible things, and the traffic in these material objects and tangible things is restrained by the combination and conspiracy of these defendants.

It is true that the contract for the vaudeville act requires the use of these material things after they are transported, in connection with certain intangible property rights, and the efforts of the performers in the giving of an exhibition. But, as heretofore shown, the act consists of all these things, and all of these things—and some of them separately—constitute property.

A motion picture film, the use of which is contracted for by a motion picture theatre, occupies the same position as does a vaudeville act. It is a product of human labor—it is property—it is contracted for in interstate commerce, but it is used by the owner of the motion picture theatre for projection on a screen in giving the exhibition.

Baseball uniforms, bats and balls are commodities which are required for and used in the giving of baseball exhibitions. They are all products of human labor—tangible, material things.

It has been held that in giving a baseball exhibition it is not "trade" or "commerce," and that a combination of clubs for the purpose of monopolizing that business is not a violation of the statute.

But, if a combination of baseball clubs engaged in the business of giving exhibitions unlawfully conspired with one another to restrain the interstate traffic in baseball bats, uniforms or baseballs generally, no one would say that such combination was not in violation of the anti-trust laws.

POINT II.

The decree and judgment of the lower Court should be reversed and the case remanded.

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WM. R. STAIN
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 763.

MAX HART,

Appellant,

vs.

B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES.

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IN THE

Supreme Court of the United States.

MAX HART,
Appellant,

AGAINST

B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY, INC., *et al.*,
Appellees.

October Term, 1922—No. 763.

BRIEF ON BEHALF OF APPELLEES.

The procedure by which this case has reached this Court is correctly stated in appellant's brief, but the facts of the case as they are alleged in the complaint are not in our judgment correctly analyzed or stated by the appellant, resulting in a false basis for his argument and a necessarily false conclusion.

Facts.

Vaudeville—what it is.

"Vaudeville, as the term is used and understood throughout the United States and in the Dominion of Canada, consists of an *entertainment* for hire" upon the stage of a theatre where, in return for an admission fee, the spectators may witness "a number of dissassociated, short performances by actors, acrobats, musicians, singers, dancers, exhibitors, conjurers, athletes and other

entertainers, and high-class vaudeville is vaudeville as above defined, performed by high class artists and acts at theatres having but two performances a day" (Record, pp. 6-7).

In the definition as thus set forth in the complaint the Court will recognize a picture of the ordinary vaudeville entertainment or "show" as presented at the B. F. Keith Theatre in Washington and similar theatres elsewhere. It is *the* business to which every other activity described in the complaint is collateral or tributary.

Each of such "disassociated, short performances" is described in the complaint as an *act* which includes "the performers, scenery, music, costumes and whatever constitutes the act" (Record, p. 8, fols. 14-14½). Appellant's brief, however, omits reference to this definition, veers away from the business so defined and sets up as a new specie of commodity a "vaudeville act" (p. 18), states that "it is the *act* that is contracted for, and not the performers" (p. 26), and that the act occupies the same position as does a motion picture film (p. 32). According to this characterization a performer, with his personality and talents, plus his stage properties is just so much inert matter like a moving picture film, and he and his accoutrement, constitute property.

The complaint describes the vaudeville business as being conducted by six classes of persons: to wit:

(a) *Authors;* (b) *Producers* who organize acts; (c) *Performers* embracing actors, acrobats, athletes, musicians, singers, jugglers, conjurers, and a great many other entertainers; (d) *Managers and personal representatives* who are the agents of those embraced in class b and c; (e) *Booking agents and booking agencies* which arrange contracts between theatre proprietors and performers or the owner of acts; (f) *Theatre proprietors* (Record, pp. 7-8).

Plaintiff's Business.

Plaintiff's business consists of keeping "performers advised of the most desirable places at which they may present their performances" * * * and he conducts "a large business as manager and personal representative of vaudeville performers and acts" and has a "substantial interest in many acts which he has always represented" * * * "has been employed by many of the most successful and best known vaudeville performers to act as their manager and personal representative" * * * and such business consists, among other things, "in contracting with such performers to negotiate for them with the proprietors of theatres and play houses for the employment of such performers by said proprietors; to arrange a series of employments in various countries and cities * * * to furnish such performers with information as to the most available and satisfactory routes of travel * * *." Plaintiff further alleges that many of the performers who have employed his services are "actors, performers, jugglers, conjurers, acrobats and various other kinds of entertainers, operating either alone or what is known as acts or troupes acting together, who as part of their performances have to and do avail themselves of the use of large quantities of scenery, costumes, etc. * * * which they carry with them from place to place and from state to state" * * * and plaintiff "in many instances as a part of his employment has attended to the transportation and shipment of such scenery, costumes, etc." (Record, pp. 9-10). Such being the plaintiff's business the appellant is mistaken when he says at page 18 of his brief: "In this case the defendants are restraining the entire business of dealing in and of contracting for vaudeville acts, and the people complaining (meaning of course the plaintiff)

are in the business of manufacturing and owning such acts and of contracting for such acts in interstate commerce, and are directly injured by the restraint of trade in the very commodity in which they are dealing." Reference to the complaint discloses no allegation of interference with or restraint of vaudeville "acts" or commodities or any attempt to monopolize "acts", etc. (Record, pp. 18-24).

Defendants' Business.

There are three corporate and ten individual defendants named in the complaint. It sets forth the business each is engaged in. The businesses are different and the distinctions are important. Appellant errs in stating at page 2 of his brief that the defendants are corporations. He also errs in there stating that the defendants are engaged in producing vaudeville acts. None of the defendants is a producer of vaudeville acts in any sense of that word. Again appellant falls into erroneous statements of fact, aside from the inconsistency with his previous statement, when he says at the bottom of page 21 of his brief "* * * we find the following facts to be undisputed: Defendants are engaged in the business of acting as middlemen between the owners of vaudeville acts and the owners of vaudeville theatres." The only defendants charged in the complaint to be middlemen are the B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc., which are alleged to be booking agencies (Record, p. 14). The defendant Edward F. Albee is alleged to own certain theatres which with other theatres are known as the "Keith Circuit" (Record, pp. 5-6). The defendants Meyerfeld and Beck are alleged to own other theatres known as the "Orpheum Circuit" (Record, pp. 6). These defendants therefore are not middlemen but principals.

The defendants Proctor and Murdock are also alleged to be theatre owners (Record, pp. 11-12).

Defendants Gugler, Jordan, Goodman and Reid Albee and the Excelsior Collection Agency are not alleged to be in the vaudeville business, and the purpose of including them in the complaint is not clear but in any event of no importance on this appeal (Record, p. 4).

The complaint alleges that defendant B. F. Keith Vaudeville Exchange is the agent for the individual defendant-theatre owners and others and as such agent negotiates with vaudeville performers or their personal representatives, such as plaintiff, for the employment of such performers by such theatre owners. It is alleged that as such agent the Keith Exchange has dealt with plaintiff and has engaged and procured contracts for the employment of various performers represented by him. The defendant Orpheum Circuit, Inc., is alleged to bear the same relationship of agency to the theatres owned by Meyerfeld and Beck that the B. F. Keith Vaudeville Exchange bears to the Keith Circuit (Record, pp. 14-15).

Conspiracy is to Restrain Local Business of Theatres.

The complaint sets forth that in November, 1920, defendants entered into a conspiracy and combination for the purpose of unduly restricting competition and obstructing the course of trade then carried on by the "defendants at the aforesaid theatres in the Keith and the Orpheum Circuit", the motive and effect of which was to secure the absolute monopoly of the high-class vaudeville business in the United States. In other words, the conspiracy is alleged to be directed against the theatre business. The complaint alleges the accomplishment of this conspiracy by twenty eight separate overt acts in not one of which are the defendants charged with any interference or attempted interference with property or commodities or any restraint on the man-

ufacture, sale, exchange or interstate movement of properties or commodities. The interferences charged have to do with the purely personal relationship of employment, viz: refusal to employ performers, refusal to deal with plaintiff as an agent, refusal to act as agent for certain theatres which dealt with plaintiff or employed performers for whom plaintiff was agent (Record, pp. 18-24). It is then alleged that defendants contriving to injure plaintiff and his business, refused to employ performers, acts, or entertainers represented by him and refused him admittance to the Keith Exchange, etc. (Record, p. 25), and he alleges that by reason of the fact that his entire life has been devoted to being a personal representative and manager of acts, performers and entertainers he cannot efficiently engage in any other business (Record, p. 26).

While the complaint does not, directly or indirectly, charge the defendants with attempts to control, monopolize, interfere with or restrain the business of manufacturing or trafficking in scenery, costumes, musical instruments or other properties, yet the appellant's brief at pages 17 and 18 contains a very ingenious statement, obviously designed to give the Court that impression, for the appellant in distinguishing this case from the *Baseball* case says "* * * it was not claimed in the baseball case that the defendants unduly control or restrain the traffic in uniforms or balls or bats or any other product of human labor. No person engaged in the manufacture of uniforms, of balls, bats or of any other product of human labor has complained of any misconduct on the part of the baseball club with respect to trade in such commodities." And again referring to the baseball case, appellant's brief continues "* * * but it was not even contended that the defendants prevented plaintiff from freely securing every character of commod-

ity required by plaintiff in its business." As there never has been any claim in this case that the defendants have prevented plaintiff or others from securing stage properties or other paraphernalia the above is quite misleading.

Interstate Feature.

The complaint alleges that the several defendants are engaged in interstate commerce because the contracts of employment, which are made between the theatre owner and the performer and which are negotiated by the booking agencies either directly with the performer or through his personal representative, contemplate and result in the performer traveling interstate and carrying with him needed stage properties (Record, pp. 8, 12, 13). It is not alleged or claimed that every performer requires stage properties. On the contrary, appellant's brief at page 16 concedes "that some vaudeville acts require the use of comparatively few properties." Nor is it alleged (as it is regarding the defendants) that the performer or the personal representative is engaged in interstate commerce.

This, therefore, is a complaint by one who does a brokerage or agency business as personal representative of actors, performers or vaudeville entertainers against certain vaudeville theatre-owners and vaudeville booking agencies. Neither authors, performers, producers or owners of vaudeville acts are involved. Neither is there involved any question of the price, production, supply or transportation of scenery, costumes, commodities or other things used by any one in the vaudeville business.

The Decision of the Trial Court.

Appellant at page 19 errs in stating "the Court further held in effect that since the dominant object of the defendants was to procure materials for use in intrastate vaudeville exhibitions * * * that procuring such material could not be interstate commerce."

The opinion below contains no such statement as the basis of the court's decision in whole or in part and such a ground is not even suggested (Record, pp. 29-30).

Law.

The principle of law enunciated by this Court in the case of *Federal Baseball Club of Baltimore* against *National League*, 259 U. S. 200, squarely covers the facts in this case and the lower court was right in dismissing the complaint herein, upon the authority of that case. The Supreme Court said at page 208:

> "A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disci-

plined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right.

The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper* v. *California*, 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

The similarity in the facts of the two cases is striking. Basicly, they are the same. In both cases the ultimate object of the business is the giving of an exhibition for the amusement of the public, one in an amphitheatre, the other in a theatre, and that which is sold to the public in both cases is entertainment; that

which is the subject of the contract between the vaudeville performer and his employer is the performer's skill or ability to entertain, just as it is the subject matter of the contract between the baseball player and his employer. When the vaudeville performer travels from State to State to give his performances, those properties which the performer carries or has transported are not the subject of sale any more than are the baseball bats, masks, gloves, etc., in the case of the baseball player. In neither case is personal effort related to production. The case of Metropolitan Opera Company against Hammerstein, decided at Special Term, in the Supreme Court, in the County and State of New York, and unanimously affirmed by the Appellate Division of that Court in 162 App. Div. 691, and thereafter affirmed without opinion by the Court of Appeals in 221 New York 507, presented the question whether the business of giving grand opera in various cities with the attendant interstate movement of persons and stage properties was interstate commerce. While, of course, not authority in this Court, we cite it, because the opinion is well reasoned and compatible with all the decisions of the United States Supreme Court on this question. The opinion in the lower Court in the Metropolitan Opera Company's case, which in its ultimate affirmance by the Court of Appeals involved the acquiescence of an aggregate of thirteen judges in the three courts, contains the following:

> "The production of opera or other theatrical exhibitions before an audience in exchange for the price of the tickets involves none of the elements of trade or commerce as commonly understood. There is no dealing with an article of trade or commerce nor any use made of any of the instrumentalities of commerce. The holder of the ticket pays a certain price as a consideration for the privilege of experiencing the gratification of an artistic sense. Such a transaction is as far removed as possible from the commonly

accepted meaning of trade or commerce. * * * If the production of opera is not commerce, the fact of its production, sometimes at one place and sometimes at another, does not make it so. If, then the thing or matter directly affected by the covenants in question is not commerce, the fact that incidentally in preparation for, or to enable it to give, the production plaintiff does some acts or enters into transactions of interstate commerce and uses the instrumentalities of interstate transportation, and to that extent is at times engaged in interstate commerce, does not bring these covenants within the provisions of the Act of Congress, for the reason that they do not relate to such acts or activities and the latter are not directly affected thereby. The effect thereon, if there be any, is only incidental, secondary and remote. * * * The fact, if it be a fact, that as a result of this contract the amount of transportation from one State to another might be curtailed or other acts of interstate commerce be in similar indirect manner affected does not bring this contract within the Sherman Anti-Trust Act. Such effect is incidental only and secondary."

We contend that shorn of all fine spun theories, and conclusions of law, the complaint in this case shows that that which is contracted for by the *theatre owner*, that which is booked by the *booking agency*, that which is furnished by the *vaudeville performer* and that which the *public* pays to witness, in short, that in which all the parties concerned deal, and with respect to which which they contract, is the professional services of the vaudeville artist and we use "artist" advisedly, because the complaint in defining vaudeville employs the same term (Record, p. 7). We claim, therefore, that such labor is not commerce at all within the meaning of the Anti-trust laws, and that the interstate movement of the actors, as well as their paraphernalia is but an incidental and secondary feature of the business. As in the baseball business, so in vaudeville it is necessary to lay

out a route or itinerary to which the performer adheres in playing his engagements. The booking agencies, in this case the B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc., bring the performer and theatre proprietor together in the execution of the contract, and when a number of these contracts are made they comprise a route over which the vaudeville performer travels, just as in the baseball case the National Commission laid out a route for the baseball clubs and their players to follow. The booking agencies function locally as the complaint alleges in the City of New York. Upon the execution of a vaudeville contract between artist and theatre owner, it is obvious the work of the booking agency ceases. Whether the vaudeville artist performs his contract is a matter wholly between the parties to the contract. It is not even alleged in this case, as it was in the baseball case, that the defendants or one of them arranged and paid for the transportation of the players, and furthermore, in the baseball case the National League purchased some properties or paraphernalia and sold and caused them to be sent interstate to the various baseball clubs. Not that these facts alter the legal conclusion any, but we refer to them as showing that the vaudeville business is even further removed from interstate commerce than baseball. When we examine the activities of each of the six classes of persons who conduct the vaudeville business as alleged in the complaint, we find that none of them is engaged in interstate commerce. FIRST: The authors—their professional work is certainly local. SECOND: Producers of vaudeville acts who are alleged to do the work of carrying out the author's ideas, rehearsing the act until it becomes the production conceived by the author. Our common experience tells us that this is all done in one place. THIRD: The performer, whose profession it is to give a demonstration of his skill or talent at some local entertainment and who even after he has given that, has

parted with nothing from the sum total of his possessions. FOURTH: Managers or personal representatives of the performers, in which class is the plaintiff. Their business is to negotiate for the actor. FIFTH: The booking agents or booking agencies is the next class and this embraces the defendants B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc. The business of these booking agencies is exactly the same as that of the Chautauqua lecture bureau referred to in the opinion of Mr. Justice Holmes in the baseball case. They are both agencies through which employment is procured or arranged. The Chautauqua bureau not only books lecturers but also divers stage performers and entertainers just as in vaudeville. Now, suppose such bureau sent out the well known Burton Holmes to lecture over a Chautauqua Circuit. He would have to carry with him or have transported the stereopticon or moving picture apparatus and the film therefor, with which to illustrate his lecture. Would this fact change the status of the lecture bureau? Clearly no. SIXTH: This class embraces theatre proprietors whose business is purely intrastate.

Appellant stresses to the point of absurdity his claim that the contracts between theatre owner and performer are contracts for commodities. If his theory were sound, such contracts could be assigned by the performer and would survive his death. The decisions, however, are many and uniform to the effect that these contracts are purely personal, terminate with the death of the performer and cannot be assigned by him. Our Courts of Equity have therefore, enforced specific performance of negative covenants in such contracts both in the case of stage players as well as baseball players where their services were especially unique.

See

Keith v. *Kellerman*, 169 Fed. 196;
Shubert v. *Rath, et al.*, 271 Fed. 827.

In *Keith* v. *Kellerman* the defendant did a "diving act" in vaudeville, which became well known throughout the country. She required a diving tank, springboard and other scenery and properties. In *Shubert* v. *Rath* the defendants were acrobats and required such property as costumes, rugs, mats and other paraphernalia. Surely the properties in both cases were not the important features of the act.

Not so many years ago the late lamented Sarah Bernhardt played most of the Keith Circuit and carried with her stage costumes, scenery, etc. On appellant's theory the properties were the act and she only an incidental feature of it. And so too with reference to the vaudeville acts referred to by appellant at page 17, in which trained animals and mechanical properties are used,—what would these animals or mechanical properties amount to as an attraction without the trainer or performer to give the exhibition? Take the artist away from these properties and they would become worthless as an attraction, although the artist might still entertain with other properties. Kreisler's violin without Kreisler wouldn't attract an audience. But Kreisler and *any* violin would.

With regard to the defendant theatre proprietors the complaint alleges that they purchase for their own use and have shipped to them for their respective theatres certain scenery and stage properties, but, of course, this does not involve them in interstate commerce any more than does the purchase and interstate shipment of machinery or other equipment to be used at a mine involve the mine operator in interstate commerce.

If we correctly understand the appellant's theory, it is that the defendants have refused to contract with the plaintiff and with vaudeville performers represented by him and that what performers have or possess is a species of property called a vaudeville act, and that as these performers travel interstate and carry certain stage prop-

erties with them the alleged restraint or interference by the defendants is one imposed upon interstate commerce. We think the case of *United Mine Workers of America against Coronado Coal Co.*, 259 U. S. 344, contains the complete answer to that theory, because if, as in the baseball case, the business in which the parties are engaged is the giving of theatrical exhibitions which are "purely state affairs", to use the language of Mr. Justice Holmes in that case, then the restraint on employment of performers, while in some way it may affect the movement of actors or may even affect or reduce the amount of stage properties purchased by them, is not such a direct obstruction of interstate commerce in those properties as is intended to be protected by the Anti-trust law. In the *Coronado Coal* case, it was alleged in substance that the Union and those acting in conjunction with it, in furtherance of a conspiracy to drive non-union coal out of interstate commerce frightened away employees of the coal company, including those directly engaged in shipping coal to other cities, prevented the Coal Company from employing their men and destroyed structures and facilities for handling and shipping coal, interferred with cars of interstate carriers waiting to be loaded, as well as those already loaded with coal intended for interstate shipment and prevented the Coal Company from engaging in or continuing to engage in interstate commerce. This Court said at page 408:

> "Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstruction to interstate commerce in *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *United States v. Ferger*, 250 U. S. 199; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S.

> 563; and *Stafford* v. *Wallace*, 258 U. S. 495. It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

And so we contend that if the defendants be guilty of interfering with or restraining anything it is the local business of entertainment or amusement, and not the interstate movement of stage properties or paraphernalia of any kind. That the local business of defendant theatre owners is not interstate commerce is too clear for extended argument.

The intrastate character of the business carried on by the defendants B. F. Keith Vaudeville Exchange and Orpheum Circuit, Inc., may be likened to that in *Hopkins* vs. *U. S.* 171 U. S. 578, although there is in our case no one engaged in dealing in commodities even intrastate. In that case an action was commenced to obtain the dissolution of the Kansas City Live Stock Exchange and to enjoin the defendants from entering into any combination of like character. From the facts stated in the opinion we quote as follows, at page 588:

> "The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other states or from the territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not

the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city."

The Court further said at pages 590-591:

"That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it * * * In this view it is immaterial over how many states the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only performed.

The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, * * * Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

As said of the business in the *Hopkins'* case, at page 590, so of the business of these defendants "* * * we must keep our attention upon the real business transacted by them * * *". The business of the Keith Exchange is the local business of furnishing booking office facilities,

and procuring two contracting parties to contract, just like any other broker. In the *Hopkins'* case, the main activities complained of were the alleged restriction as to the persons who might do business at the Exchange and the charge for services at the Exchange. In this case the main complaint is the alleged restraint upon the employment of artists, their personal representatives and the alleged excessive booking commission charged for the purely local service of booking.

The case of *Marinelli* vs. *United Booking Offices*, 227 Fed. 165, cited by the appellant at page 23 of his brief, cannot in the face of the decision of the Supreme Court in the baseball case be considered sound because the Court in that case said "that in travelling from state to state in the performance of theatrical contracts, the performers were fulfilling their contracts as much by travel as by acting" citing the so-called White Slave cases. It did not base its decision on the interstate movement of properties, because it said that this feature was incidental, but it placed its decision squarely on the proposition that contracts between the theatre owner and performer involved for their performance "the transit quite as much as the performance". The conclusion reached by this Court on this very same feature in the baseball case is just the contrary. Furthermore while Congress may have power to expressly regulate concerning any matter of interstate trade or commerce, no matter how remote or incidental, no such statute was involved in the *Marinelli* case, nor is it here. This Court has repeatedly decided that Congress did not intend that the Anti-Trust laws should apply to a business in which interstate commerce is only indirectly or incidentally affected.

Appellant at page 24 of his brief, also quotes from the opinion of the Court of Appeals in the Baseball case, in which it refers to the *Marinelli* case and attempts a distinction between it and the baseball case. We re-

spectfully submit that the reference to the *Marinelli* case is pure dicta, and that the Supreme Court did not necessarily adopt all the reasoning and language of the Court of Appeals in affirming its judgment. The distinction which the Court of Appeals made was that in the *Marinelli* case the entire business consisted in the negotiation of a contract to travel and perform, and that the brokers —in this case the B. F. Keith Vaudeville Exchange and the Orpheum Circuit, Inc.—were not interested in the services rendered or skill exhibited by the performers. Now, if the act of travelling is not interstate commerce within the purview of the statute in so far as the performer and the theatre owner, parties to the contract are concerned, how can the broker be said to be engaged in interstate commerce when he is but the agent in bringing about the contract, and if the brokers, as the Court of Appeals said, were not interested in the services rendered or skill exhibited by the performers, which, of course is the fact, then for this added reason, the brokers are not engaged in interstate commerce, even if the parties to the contract were. If this distinction were sound, then a baseball employment agency or brokerage concern, engaged in introducing baseball players to club owners and bringing them into contractual relations, would be engaged in interstate commerce, though no one else involved in the transaction were.

The case of *Rankin against Associated Bill Posters,* cited by the appellant at page 28 of his brief, is not applicable, because to quote from the opinion itself the purpose of the combination in that case was "to destroy competition and secure a monopoly by limiting and restricting commerce in posters and to enrich the members by demanding non-competitive prices". If in this case it were alleged that the defendants had combined to secure a monopoly by limiting and restricting orders in scenery or other tangible properties, or had interferred with the price supply or flow of such commodity in commerce, the

case would bear an analogy. And so, too, appellant's comparison at page 13 of his brief, between the contract for the *sale* and interstate movement of such entertainment devices as motion picture films, phonographic records and piano player rolls, tangible things bought and sold by the piece, and the contract of employment of a vaudeville performer who sells nothing but only renders a service is without any weight.

The judgment below should be affirmed.

Respectfully submitted,

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HART *v.* B. F. KEITH VAUDEVILLE EXCHANGE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 763. Argued May 2, 3, 1923.—Decided May 21, 1923.

1. A bill in the District Court setting up a claim of federal right should not be dismissed for lack of jurisdiction because the claim is wanting in merit, if it be not wholly frivolous. P. 273.
2. Plaintiff, by a bill brought before the decision of this Court in *Federal Base Ball Club* v. *National League*, 259 U. S. 200, sought an injunction and damages, under the Anti-Trust Act of 1890, against an alleged conspiracy of theatre owners and of corporations engaged, like himself, in the business of getting contracts for vaudeville actors to perform throughout the United States, and of acting as their manager and personal representative, alleging that the business involved contracts not only for travel of performers from State to State and from abroad, but also for transportation of vaudeville acts, including performers, scenery, music, costumes, etc., resulting in a constant stream of commerce from State to State, in which, he claimed, the apparatus transported was not a mere incident, but sometimes more important than the performers. *Held*, that the claim that the case came within the Anti-Trust Act was not frivolous, and that the bill should not have been dismissed by the District Court for want of jurisdiction. P. 274.

Reversed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a bill for an injunction and damages, brought under the Anti-Trust Act.

Mr. Martin W. Littleton, with whom *Mr. Louis B. Eppstein, Mr. Laurence H. Axman* and *Mr. Ira W. Hirshfield* were on the brief, for appellant.

Mr. George Wharton Pepper, with whom *Mr. Maurice Goodman* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by one whose business is getting contracts for vaudeville performers to perform in theatres all over the United States and acting as their manager and personal representative. It is brought against a combination of corporations engaged in similar business, and the owners of a large number of theatres known as the Keith Circuit, the owners of others known as the Orpheum Circuit, and some other persons not needing special mention here, who it is alleged are ruining the plaintiff's business by a conspiracy forbidden by the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. An injunction and enormous damages are asked. The bill was dismissed for want of jurisdiction by the District Court on the ground that it did not state a cause of action arising under the Constitution or laws of the United States.

The bill sets out at superfluous length a combination of the defendants to exclude actors from the theatres controlled by them, being practically all the theatres in the United States and in Canada in which high class vaudeville entertainments are produced, and to exclude the managers and personal representatives of actors from the defendants' booking exchange in New York and from business, unless they respectively comply with the defendants' requirements, including the payment of considerable sums. It is alleged that a part of the defendants' business is making contracts that call on performers to travel between the States and from abroad and in con-

nection therewith require the transportation of large quantities of scenery, costumes and animals. Some or many of these contracts are for the transportation of vaudeville acts, including performers, scenery, music, costumes and whatever constitutes the act, so that it is said that there is a constant stream of this so-called commerce from State to State. The defendants contend and the judge below was of opinion that the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that, and therefore that the case is governed by *Federal Base Ball Club* v. *National League*, 259 U. S. 200. On the other hand it is argued that in the transportation of vaudeville acts the apparatus sometimes is more important than the performers and that the defendants' conduct is within the statute to that extent at least.

The jurisdiction of the District Court is the only matter to be considered on this appeal. That is determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not. *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203. *Lamar* v. *United States*, 240 U. S. 60. *Geneva Furniture Manufacturing Co.* v. *S. Karpen & Bros.*, 238 U. S. 254, 258. *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25. While appeals to this Court often are dismissed as frivolous, *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 109, 110, the former case expressly and the latter by implication follow and reaffirm *Swafford* v. *Templeton*, 185 U. S. 487, 493, to the effect that when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction "however wanting in merit" may be the averments intended to

establish a federal right. See also *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S. 265, 275, 276. It is not necessary to draw the line between the foregoing and other cases brought in Courts of the United States to assert a claim under the Constitution that have been ordered to be dismissed below because "absolutely devoid of merit," *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576, 579, beyond confining the latter to those that are very plain. It is enough that we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress, or at least that the claim is wholly frivolous. The bill was brought before the decision of the *Base Ball Club Case*, and it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently. The logic of the general rule as to jurisdiction is obvious and the case should be decided upon the merits unless the want of jurisdiction is entirely clear. What relief, if any, could be given and how far it could go it is not yet time to discuss.

Decree reversed.